No. 90-622-CSY
Status: GRANTED

Title: Florida, Petitioner
v.
Luz Piedad Jimeno and Enio Jimeno

Docketed:
October 15, 1990

Court: Supreme Court of Florida

Counsel for petitioner: Neimand,Michael J.

Counsel for respondent: Efronson,Sidney, Weiner,Jeffrey S.

Entry	Date	Note	Proceedings and Orders
1	Oct 15 1990	G	Petition for writ of certiorari filed.
2	Nov 14 1990		DISTRIBUTED. November 30, 1990
3	Nov 15 1990	X	Brief of respondents Luz Piedad Jimeno and Enio Jimeno in opposition filed.
4	Dec 3 1990		Petition GRANTED.
			**********
5	Jan 2 1991		Record filed.
		*	Certified copy of original record received.
6	Jan 17 1991		Brief amicus curiae of United States filed.
7	Jan 17 1991		Brief of petitioner Florida filed.
8	Jan 22 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Jan 22 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
10	Feb 1 1991		SET FOR ARGUMENT MONDAY, MARCH 25, 1991. (3RD CASE)
11	Feb 19 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
12	Feb 19 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
13	Feb 21 1991		CIRCULATED.
14	Feb 22 1991	X	Brief of respondents Luz Piedad Jimeno and Enio Jimeno filed.
15	Mar 18 1991	D	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae, out-of-time, filed.
16	Mar 18 1991	D	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Mar 25 1991		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae, out-of-time, DENIED.
18	Mar 25 1991		Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
19	Mar 25 1991		ARGUED.

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-622

Supreme Court, U.S.
FILED
OCT 15
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CLERK

No. _____

IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

DOES THE SCOPE OF A CONSENT SEARCH EXTEND TO ALL AREAS, INCLUDING CLOSED CONTAINERS, WHICH COULD REASONABLY CONCEAL THE OBJECT OF THE SEARCH, WHEN THE CONSENTING INDIVIDUAL IS ADVISED AS TO THE NATURE OF THE INVESTIGATION AND THE OBJECT OF THE SEARCH.

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No. _____

IN THE
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October Term, 1990

THE STATE OF FLORIDA,
Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at ___ So.2d ___, 15 F.L.W. S412, No. 75,057 (Fla. July 26, 1990). (Pet. App. 1a-3a).

The opinion of the District Court of Appeal of Florida, Third District is reported at 550 So.2d 1176 (Pet. App. 4a-6a).

The trial court's order granting motion of Respondents, Luz Piedad Jimeno and Enio Jimeno to, suppress evidence is not reported. (Pet. App. 7a-11a).

JURISDICTION

The Supreme Court of Florida's opinion was filed on July 26, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section I, United States Constitution provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, were the Respondents in the Supreme Court of Florida. The facts of the case, as set forth in the trial court's order granting the motion to suppress, are as follows:

> On March 2, 1989, the Court heard the defendants' motions to suppress. None of the three defendants were present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings.
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was

seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, i[n] (sic) fact, the officer never requested permission to open the bag and examine the contents.

(Pet. App. 7a-10a). The trial court in reliance on *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd. on other grounds,* 110 S.Ct. 1632 (1990), held that the scope of the consent given did not extend to the search and seizure of the bag. The trial court then granted the motion to suppress of Luz Piedad Jimeno and Enio Jimeno. (Pet. App. 10a).

The State appealed this decision to the District Court of Appeal of Florida, Third District. That court affirmed the trial court's suppression of the evidence. The court held that

a consent to a search of an area for narcotics does not extend the scope of the consent to a sealed container located within the general area consented to. This holding did not take into account that the container sought to be searched reasonably could have contained the object of the search. The Third District certified to the Florida Supreme Court of Florida, the question of whether the scope of consent extends to a closed container after consent has been given to search a motor vehicle for narcotics. (Pet. App. 4a-6a).

The Supreme Court of Florida accepted the State's petition for discretionary review based on the certified question. That court approved the decision of the district court. The Supreme Court concluded that consent to search the motor vehicle for narcotics was strictly limited to the passenger compartment of the motor vehicle. The scope of the consent did not extend to any containers located within the passenger compartment, regardless of whether the container reasonably could have contained the object of the search, to wit: narcotics. The Supreme Court based its holding herein on its alternative holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989) *aff'd. on other grounds,* 110 S.Ct. 1632 (1990). (Pet. App. 16a-28a).

In *Wells,* the Supreme Court held that a general consent to open and look into the trunk of an automobile, without informing Wells what the police were looking for, was insufficient to authorize the opening of any locked or closed container found in the trunk. The court rejected the State's argument that, pursuant to *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2151, 72 L.Ed.2d 572 (1982), the scope of a consent search extends to every part of the vehicle and its contents that may conceal the object of the search.

> ... We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the author-

> ity conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

Wells, supra at 467 (Pet. App. 19a-21a).

The dissent found that the majority's interpretation of *Ross* was overly restrictive and erroneous. While acknowledging that *Ross* would not be authority to exceed the specific scope of a restricted search, the dissent reasoned that the *Ross* analysis is applicable to an unrestricted consent search. (Pet. App. 44a-46a).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE SCOPE OF A CONSENT SEARCH IS NARROWER THAN THE SCOPE OF A SEARCH AUTHORIZED BY A WARRANT CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.

After Enio Jimeno's vehicle was lawfully stopped, he freely and voluntarily consented to have his car searched for narcotics. Officer Trujillo found a rolled up brown paper bag on the floor of the front passenger side. Without requesting permission to open the bag, Officer Trujillo opened the bag and discovered cocaine. The trial court suppressed the cocaine finding that the scope of the consent did not extend to the brown paper bag. (Pet. App. 8a-10a). The Supreme Court of Florida affirmed the trial court's action. The court's affirmance was in accord with the holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* 110 S.Ct. 1632 (1990) that the scope of a consent search is narrower than the scope of a search based on a warrant or probable cause.

This holding, based on an erroneous interpretation of the scope of the consent search, resulted in an overly restrictive misapplication of the law to the facts herein. The proper interpretation of the scope of a consent search is that it is just as broad as a search based on warrant or probable cause.

This Court first recognized that the scope of a consent search is precisely the same as that of a search authorized by warrant in *Schneckloth v. Bustamonte,* 412 U.S. 218, 243, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This principle was reaffirmed by this Court when it noted in *Walker v. United*

States, 447 U.S. 649, 657, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) that, "[w]hen an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization." An example of the principle followed:

> ... Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. ...

Id. at 657-658. These examples met the Fourth Amendment requirement that the scope of every authorized search be particularly described. *Id.* at 658.

The Supreme Court of Florida, on the other hand, could not understand the logic of equating the scope of a consent search with that of a search authorized by warrant. *State v. Wells, supra,* 539 So.2d at 467. An example of that court's logic is that, "the search of the trunk of a car would be permitted even if the defendant had said, 'You can look in my car, but not in my trunk!' " *Id.* at 467. This erroneous conclusion is based on the erroneous premise that the principles that apply to probable cause searches are totally inapplicable to consent searches. The court reasoned that a consent to search a vehicle containing luggage does not extend to the luggage, if the search of the vehicle itself does not reveal anything. This is so because probable cause does not exist from the search of the vehicle itself to allow the greater intrusion into the luggage. (Pet. App. 16a-21a).

The Supreme Court of Florida's premise is erroneous because a consent to search a particular area for a particular object, just as a warrant to search a particular area for a particular object, extends to all items located within the authorized area which might reasonably contain the object

of the search. In *United States v. Ross,* 456 U.S. 798, 820-822, 702 S.Ct. 2157, 72 L.Ed.2d 572 (1982) this Court succinctly stated this principle:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. (Footnotes omitted).

Thus, the Supreme Court of Florida's holding that the scope of a consent search is narrower than the scope of a search by a warrant is in direct conflict with precedent from this Court on this question.

The decision below also expressly conflicts with decisions of the United States Courts of Appeal on this issue. It also conflicts with decisions of appellate courts of other states.

In *United States v. Dichiarinte,* 445 F.2d 126 (7th Cir. 1971), the defendant consented to search his house for narcotics. During the search, the police opened desk drawers, inspecting and seizing personal papers. The court held that the consent to search for narcotics limited the police to searching only those areas which might reasonably contain narcotics. The court found that the scope of a consent search was no broader that a search conducted pursuant to a search warrant. Since a search warrant for narcotics would not have given the agents the power to read the defendant's documents, a consent search for narcotics was bound by the same scope:

> The Government complains that if we accept the defendant's argument, the limitations on officers' conduct under consent searches will be more stringent than under searches pursuant to a warrant. In our view, consent is a waiver of the right to demand that government agents obtain the authorization of a warrant to justify their search; and the need for a warrant is waived only to the extent granted by the defendant in his consent. A defendant's consent may limit the extent or scope of a warrantless search the same way that the specifications of a warrant limit a search pursuant to that warrant. Both limit the officers' activity by stipulating the areas into which they may look. Both may limit a search to certain areas or even to certain specified items within an area. *See United States v. Hopps,* 215 F.Supp. 734 (D.Md.1962), *aff'd.* 331 F.2d 332 (4th Cir.), *cert. denied,* 379 U.S. 820, 85 S.Ct. 39, 13 L.Ed.2d 31 (1964); *People v. Schmoll,* 383 Ill. 280, 48 N.E.2d 933 (1943). Thus if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is

> necessary to search for such an item; they may not rummage through private documents and personal papers.

Id. at 129-130 n.3.

In *United States v. Ware,* 890 F.2d 1008 (8th Cir. 1989), the defendant gave the police consent for a complete search of his apartment for narcotics. Using keys secured from defendant, the police opened the door to a locked storage door. Inside the storage area the police discovered cocaine. The court, relying on a search warrant case, which held that a warrant describing the apartment but not mentioning a storage area, was sufficient to allow the police to search the storage area since it was reasonable to suppose that the storage cabinet was appurtenant to the apartment:

> ... As for Ware's assertion that the scope of a consent search somehow is more restrictive than the scope of a warrant search, we point out the Supreme Court's statement that the standard is the same for both: "When an official search is properly authorized—*whether by consent or by the issuance of a valid warrant*—the scope of the search is limited by the terms of its authorization." *Walter,* 447 U.S. at 656, 100 S.Ct. at 2401 (emphasis in original).

Id. at 1011.

In *United States v. McBean,* 861 F.2d 1570 (11th Cir. 1988), the defendant was validly stopped for a traffic violation and thereafter consented to a search of the car. The search of the passenger compartment produced nothing. The trooper then opened the trunk of the car and found two pieces of luggage. A search of the luggage revealed marijuana. Although the case was decided on standing, the court citing *United States v. Dichiarinte, supra* at 129 n.3, held

that the scope of a consent search is defined by the scope of actual consent in the same way that the scope of a search based upon a search warrant is defined by the warrant. *See also United States v. Strickland,* 902 F.2d 937 (11th Cir. 1990).

In *United States v. Anderson,* 859 F.2d 1171 (3d Cir. 1988), the defendant's vehicle was lawfully stopped and the defendant signed a consent form which authorized removal of any property pertinent to a narcotics investigation. The police searched the trunk and discovered two bags which contained large sums of money. The court rejected the defendant's contention that scope of the consent was exceeded when the trunk was searched and the bags therein were located:

> ... Similarly, Officer Douglas, in searching the vehicle for evidence that the drug laws had been violated could not expect the contraband to be lying in plain view. As this circuit has said in the search warrant context: "Permission to search an automobile would be hollow indeed if it did not include permission to search its contents and component parts." *United States v. Milhollan,* 599 F.2d 518, 527 (3d Cir.), *cert. denied,* 444 U.S. 909, 100 S.Ct. 221, 62 L.Ed.2d 144 (1979).

Id. at 1176.

In *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) the defendant was lawfully stopped and gave the police consent to search his motor vehicle for open containers of alcohol. During the search, the police observed two paper sacks; one clearly could contain alcoholic beverages and the other clearly could not. The police ignored the bag that could have contained the alcoholic beverages, opened the other one instead and discovered narcotics. The trial court suppressed the narcotics and was affirmed by the Supreme Court of

North Dakota. That court, applying the warrant standard to determine the scope of consent, found that the police only had authority to open bags which could reasonably contain the object of their search. Therefore, the court held that since the smaller bag could not possibly contain alcoholic beverages, the defendant's consent did not extend thereto. In support of its holding the court relied on *United States v. Ross, supra, United States v. Kapperman,* 764 F.2d 768 (11th Cir. 1985) (Applying the *Ross* analysis to consent searches) and *United States v. White,* 706 F.2d 806 (7th Cir. 1983) (same).

In *Gamble v. State,* 318 Md. 120, 567 A.2d 120 (1989), the defendant, a police officer, was advised that he was suspected of stealing money from a narcotics arrest. After being so advised, the defendant consented to a search of his automobile trunk. During the search a gym bag was opened and the missing money was discovered. The court, relying on *Ross,* held that the scope of consent extended to the gym bag since the object of the search, the money, could reasonably have been expected to be found in the gym bag.

As the foregoing decisions evidence, the appellate courts that have reached the question, have held that the scope of a consent search is as broad as a search authorized by a warrant. The reason is when an individual is informed as to the reason for the search, then the consent that is given extends to any item within the authorized area which could reasonably contain the object of the search. This is exactly what occurs in warrant situations, where a warrant to search a motor vehicle for narcotics extends to all containers found therein which could contain narcotics. This same standard applies in consent searches, especially where consent to search a motor vehicle is given only after the individual has been advised that the search is for narcotics and where the containers searched could contain narcotics. The instant decision, a radical departure from precedence, holds

that a consent search is narrower than one authorized by warrant and that consent is required for each item found during an authorized consent search, even when the item found could contain the object of the search. This rogue case has caused a schism in authority which will continue to widen without guidance from this Court, and therefore this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, **The State of Florida,** respectfully requests that this Court grant its Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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No. _____

IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,
Petitioner,
vs.
LUZ PIEDAD JIMENO
and
ENIO JIMENO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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Supreme Court of Florida

No. 75,057

STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO, et al.,

Respondents.

[July 26, 1990]

GRIMES, J.

We accepted jurisdiction[1] to review *State v. Jimeno,* 550 So.2d 1176 (Fla. 3d DCA 1989), wherein the district court of appeal certified as being of great public importance a question concerning the lawfulness of searching a closed container after consent has been given to search a motor vehicle for narcotics.

We agree with respondents that under *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd,* 110 S.Ct. 1632 (1990), the consent to search a vehicle does not extend to a closed container found inside the vehicle.

Therefore, we approve the decision of the district court of appeal.

It is so ordered.

SHAW, C.J., and OVERTON, EHRLICH, BARKETT and KOGAN, JJ., CONCUR
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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1 Art. V, 3(b)(4), Fla. Const.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Third District - Case No. 89-888

(Dade County)

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, Miami, Florida,

for Petitioner

Sidney Efronson and Ramon Tourgeman of the Law Offices of Sidney Efronson, Miami, Florida,

for Respondents

In The

District Court of Appeal of Florida Third District

July Term, A.D. 1989

THE STATE OF FLORIDA,
Appellant,

vs. CASE NO. 89-888

LUZ PIEDAD JIMENO and
ENIO JIMENO,
Appellees.

Opinion filed October 24, 1989.

An appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General for appellant.

Sidney Efronson and Ramon Tourgeman and Calianne P. Lantz, for appellees.

Before BARKDULL, NESBITT, and JORGENSON, J.J.

PER CURIAM.

The state appeals from an order granting defendants' motion to suppress physical evidence. We affirm.

The question presented in this appeal is whether a concededly valid consent to search a motor vehicle for narcotics permits a search of a closed paper bag found on the front floor of the passenger side of that car. The trial court found that even though the officer advised defendants that he wanted to search the vehicle for illegal drugs, defendants

never specifically consented to a search of the rolled-up bag. Based on that finding, the trial court concluded that the scope of the consent given did not extend to the search and seizure of the bag.

This court has held that consent to a general search for narcotics does not extend to "sealed containers within the general area agreed to by the defendant." *Shelton v. State*, No. 87-1883 (Fla. 3d DCA Sept. 26, 1989). We decline to depart from the holding and rationale of *Shelton*;[1] we certify to the Florida supreme court the same question certified in *Shelton*.

Affirmed.

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1 As in *Shelton*, here, viewing the totality of the circumstances, "the record is devoid of any facts which would have justified the opening of the sealed container at issue." *Id.*

In The Circuit Court Of The Eleventh Judicial Circuit In And For Dade County, Florida Criminal Division

Case No. 88-23967

THE STATE OF FLORIDA,
Plaintiff,

vs.
ENIO JIMENO, CESAR TABARES,LUZ JIMENO,
Defendants.

ORDER GRANTING MOTION TO SUPPRESS AS TO DEFENDANT, ENIO JIMENO, and DEFENDANT, LUZ JIMENO

ORDER DENYING MOTION TO SUPPRESS AS TO DEFENDANT, CESAR TABARES

On March 2, 1989, the Court heard defendant's motions to suppress. None of the three defendants was present and counsel agreed to waive their presence.

Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:

1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went

by car to an apartment complex, waited in their car, they drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.

2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, if fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, see

State v. Wells, 13 F.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted*.

However, as to the defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

DONE AND ORDERED in chambers at Miami, Dade County, Florida this 21 day of March, 1989.

/s/ Fredricka G. Smith
FREDRICKA G. SMITH
CIRCUIT COURT JUDGE

Copies furnished to:
Sidney Efronson, Esq.
Juan Vargas, Esq.

STATE OF FLORIDA,
Petitioner,

vs.

MARTIN LESLIE WELLS,
Respondent.

No. 69,363

Supreme Court of Florida

March 2, 1989

PER CURIAM.

On motion for rehearing by petitioner, we withdraw our prior opinion in this cause and substitute the following as the opinion of the Court.

We have for review *Wells v. State,* 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with *State v. Wargin,* 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper

1 A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

agreed, but accompanied respondent to the vehicle. At this point the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the-

locked container found during the automobile inventory search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that *Wargin* correctly extended the principles of *United States v. Ross,* 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the *Ross* Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, *Ross* held: "If *probable cause* justifies the search of a lawfully stopped *vehicle,* it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825 (emphasis added).

There was no issue of a consent search in *Ross.* Indeed, the principles that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As *State v. Fuksman,* 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in *Ross* is grounded do not exist in the consent search context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *Id.* On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but *not* in my trunk."

Thus, we decline to apply *Ross* to consent searches, and, to the extent it conflicts with our opinion today, we disapprove *Wargin.* We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permission merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

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2 *Ross* itself reached this conclusion when it explicitly distinguished United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979). *See* United States v. Ross, 456 U.S. 798, 811-15 (1982). *Chadwick* had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than in an automobile." *Id.* at 13. *Sanders* had suggested that a warrant was required to open a suitcase where "it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). *Ross* reaffirmed this holding, although it rejected some of *Sanders'* analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

As stated in *Chadwick:*

> Once the federal agents had seized it ... there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. ... With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. Our own courts generally have agreed on this principle. *State v. Carney,* 423 So.2d 511 (Fla. 3d DCA 1982) (permission to go aboard boat did not give consent to open hidden compartments and containers therein); *Loftis v. State,* 391 So.2d 219 (Fla. 1st DCA 1980) (defendant's cooperation in opening truck did not give agricultural inspector consent to remove and open taped package), *review denied,* 399 So.2d 1146 (Fla. 1981); *Major v. State,* 389 So.2d 1203 (Fla. 3d DCA 1980) (no consent where defendant opened tote bag for airport officer to look in, but where officer spontaneously reached in and grabbed a nasal inhaler containing contraband), *review denied,* 408 So.2d 1095 (Fla. 1981); *Luxenburg v. State,* 384 So.2d 742 (Fla. 1st DCA 1980) (opening vehicle to agricultural inspector did not authorize him to slit open bag with knife); *Moorehead v. State,* 378 So.2d 123 (Fla. 2d DCA 1980) (consent for officer to look at pool cue did not authorize unscrewing of cue to see what was rattling inside); *Villari v. State,* 372 So.2d 522 (Fla. 1st DCA 1979) (no consent when defendant allowed access to vehicle but asked "Don't you need a warrant" when officers approached containers and luggage); *Ross v. State,* 369 So.2d 447 (Fla. 1st DCA 1979) (no consent when defendant allowed officers to look in camper but apparently denied access to containers); *Raleigh v. State,* 365 So.2d 1048 (Fla. 4th DCA 1978) (no

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433 U.S. at 12. Moreover, *Chadwick* expressly noted that the search of the footlocker was a far greater intrusion into interests protected by the fourth amendment than was the mere seizure of the footlocker. *Id.* at 14 n.8.

consent where occupants acquiesced to warrantless search of vehicle's trunk where officer opened trunk himself without asking permission).

In the present case, the arresting officer plainly stated he had no actual consent to open the suitcase found in the automobile trunk.[3] We thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4] *Wells*, 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside

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3 The following colloquy with the arresting officer occurred:

Q: Did [Wells] give you permission to go into the trunk of that car?

A. Oh, yes, no problem, but he said — I said: "Do you mind if I look in your trunk," and he said, "Sure go right ahead."

. . . .

Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?

A. No, I didn't.

4 We acknowledge that this case raises an issue as to whether respondent had standing to assert a privacy interest in the luggage itself, since he apparently contended the luggage was not his. *See* United States v. Salvucci, 448 U.S. 83 (1980) (receding from the "automatic standing" doctrine). We find, however, that the state effectively has waived this argument by failing to raise it below, or in this appeal. *See* Steagald v. United States, 451 U.S. 204, 209 (1981). Moreover, respondent unquestionably does have a protected privacy interest in the borrowed car he was driving, which confers standing to challenge both the impoundment and inventory search conducted in this instance. *See* United States v. Posey, 663 F.2d 37 (7th Cir.), *cert. denied*, 455 U.S. 959 (1982); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982), *aff'd in pertinent part*, 309 N.C. 224, 306 S.E. 2d 446 (1983); People v. Robinson, 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); People v. Zimmerman, 117 Misc.2d 121, 458 N.Y.S.2d 468 (Sup. Ct. 1982).

that container, *Arkansas v. Sanders*, 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. *See* Art. I, § 23, Fla. Const.

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not sustainable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage was independently permissible under an inventory search theory. In *Colorado v. Bertine*, 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. *Bertine* stated:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 742 n.6 (emphasis added; citations omitted). As Justice Blackmun noted in his special concurring opinion, joined by two other justices:[5]

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5 These three justices also concurred in the majority opinion, and specifically cited footnoe 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the *Bertine* court.

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensured that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search *only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.*

Id. at 744 (Blackmun, Powell & O'Connor, JJ., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to *Bertine's* holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in *Bertine,* this record is devoid of any trial-court finding "that the police department's standard procedures did mandate the opening of closed containers and the listing of their contents." *Id.* Joining this action as *amicus curiae,* the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fail to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine*

must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated Bertine.

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the search of the interior of the car that followed was proper under *Bertine.* This conclusion is compelled by the fact that, to the extent of any inconsistency, *Bertine* has superseded *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981). Under the analysis in *Bertine,* we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders.* Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. *See* Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked container, the suppression of the butts was improper under *Bertine.*

We thus, approve in part and quash in part the result reached by the district court below, and remand for proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is ordered.

ENRLICH, C.J., and BARKETT, GRIMES and KOGAN, J.J., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SHAW, J., dissenting.

Article I, section 12 of the Florida Constitution provides that rights granted therein involving searches and seizures will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of impoundment and inventory search is controlled by *South Dakota v. Opperman,* 428 U.S. 364 (1976), and its progeny. I agree with the majority that *Colorado v. Bertine,* 479 U.S. 367 (1987), has overruled *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that *Bertine* mandates exclusion of the eighteen pounds of marijuana found locked in the suitcase.

Wells was stopped for speeding on a rural road between Palatka and St. Augustine in the evening hours. He alighted from his car and produced an expired driver's license and a car title in another's name. After the officer detected alcohol on his breath, Wells failed a roadside sobriety test and was arrested for driving under the influence. Wells asked, however, to retrieve a coat from the car. While doing so, the officer saw a large sum of cash lying on the floorboard in front of the driver's seat. Wells gave conflicting explanations of this money and it was impounded and inventoried. The arresting officer asked Wells to open the car trunk and Wells agreed, saying he did not know what was inside, but neither the officer nor Wells could open the trunk. Wells agreed that the trunk could be forcibly opened, if necessary, after towing.

The car was left with a backup officer and later towed. The arresting officer transported Wells to the local police station for a breathalyzer test and proceeded to the storage area to inventory the car. The arresting officer found two marijuana cigarette butts in the car's ashtray. The tow operator then opened the trunk where a locked suitcase was found. The suitcase was forced open and eighteen pounds of marijuana in a trash bag was seized.

The majority holds that the police acted properly in impounding the car. However, relying primarily on *Bertine,* the majority holds that the eighteen pounds of marijuana should be excluded because Florida Highway Patrol standardized procedures do not specifically mandate that locked containers found in impounded cars be opened and inventoried. Although the FHP can easily remedy this perceived deficiency in their operating instructions, I am persuaded that the current instructions effectively mandate the opening and inventorying of such closed containers when a vehicle is impounded and that these instructions are indistinguishable from those in *Bertine.*

The inventorying of the contents of impounded cars is based on three distinct needs: to protect the owner's property; to protect the police against claims over lost or stolen property; and to protect the police from potential dangers, such as explosives. *Opperman,* 428 U.S. at 369. The Florida Highway Patrol, Forms and Procedures Manual, section 16.00.00, provides:

> In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner *become the respon-*

> ***sibility of the impounding officer. The officer is liable for the vehicle, its part and contents.*** Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(Emphasis supplied.) Chapter 16.01.00 of the manual provides that inventory forms will be used any time a vehicle is towed and/or stored. Chapter 16.02.00 instructs officers, inter alia: "Lost Property in Vehicle—Inventory of *all articles* in the vehicle should be shown such as articles of clothing, equipment and tools." (Emphasis supplied.) The companion form contains columns labelled "Item," "Quantity," and "Description of Property Obtained."

In my view, these instructions make clear that an inventory is required for all impounded cars and that the inventory will be comprehensive and detailed, extending down to articles, not merely containers, closed or otherwise. This reading of the instructions is consistent with the testimony of the officer who conducted the arrest and inventory. According to this officer, he consulted with his backup officer and supervisor, and, as in the case of previous arrests, the inventory was performed according to procedures he was supposed to follow. This understanding of the standard instructions by the persons to whom they are addressed is also consistent with the three purposes of the inventory set

forth in *Opperman* and reiterated in *Bertine,* none of which would be adequately served if closed containers were not opened and inventoried when vehicles are impounded.

The majority's conclusion that here, unlike *Bertine,* the police operating instructions do not mandate the opening of closed containers is contrary to the facts of *Bertine* as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." *Bertine,* 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. *Bertine,* 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the *Bertine* concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view *Bertine* stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

The majority also distinguishes *United States v. Ross,* 456 U.S. 798 (1982), holding that *Ross* addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found Ross relevant to the scope of a consent search. *United States v. Kapperman,* 764 F.2d 786, 794 (11th Cir. 1985); *United States v. White,* 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of *Bertine, Ross* is relevant to inventory searches.

> "When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross, supra,* 456 U.S. at 821, 102 S.Ct. at 2170.
>
> We reaffirm these principles here: " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.' " See *Lafayette, supra,* 462 U.S. at 648, 103 S.Ct. at 2610 (quoting *New York v. Belton,* 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the *Bertine* Court chose to affirm their application to a non-probable cause, inventory search strongly suggests that the Supreme Court does not take the narrow view of *Ross* which the majority adopts here. While *Ross* would not be authority to exceed the

specific scope of a restricted consent, as the majority points out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied *Bertine* which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, J.J., Concur

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Fifth District - Case No. 85-1630

(Putnam County)

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Sharon W. Ehrenreich of Moore and Ehrenreich, Gainesville, Florida,

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Enoch J. Whitney, General Counsel and R.W. Evans, Assistant General Counsel, Tallahassee, Florida,

Amicus Curiae for Department of Highway Safety and Motor Vehicles

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90-622
Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED (RESTATED)

DOES THE SCOPE OF A SEARCH OF A MOTOR VEHICLE FOR NARCOTICS AUTHORIZED SOLELY BY CONSENT EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

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No.

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THE STATE OF FLORIDA,

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at ____ So.2d ____, 15 F.L.W. S412, No. 75,057 (Fla. July 26, 1990). (Resp. App. A–1).

The opinion of the District Court of Appeal of Florida, Third District is reported at 550 So.2d 1176 (Fla. 3rd DCA, 1989) (Resp. App. A-3).

The trial court's order granting Respondents' Motion to Suppress Evidence is not reported. (Resp. App. A-5).

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, adopt the facts of the case as stated in the following trial court order granting the motion to suppress:

> On March 2, 1989, the Court heard the defendants' motion to suppress. None of the three defendants was present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.
>
> 3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.
>
> 4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.
>
> 5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.
>
> 6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, in fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, *see State v. Wells*, 13 Fla.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted*.

However, as to defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

Respondents in order to comply with Rule 15.1 point out that even though the Petitioner in its Brief appears to recite verbatim the trial court order, the Petitioner omitted the second and third paragraphs of section six of the order where the Court found that the search of the respondents' motor vehicle was not authorized by probable cause and was solely legally permissible based upon the consent given. (Petitioners' brief at 3-4, A-1, 2,) (Resp. App. A-5.)

The state appealed the trial court's order suppressing the evidence to the Florida Third District Court of Appeal. The court, based on its prior decision in *Shelton v. State*, 549 So.2d 236 (Fla. 3rd DCA, 1989), held that the consent to the search of the Respondents' motor vehicle for narcotics did not extend to a search of

the container where the contraband was found. (Resp. App.-3.) The court referred to its opinion in *Shelton* where it reasoned that the scope of a search authorized solely by consent is not broadened to include closed containers just because the purpose of the search was mentioned when eliciting the consent.

> . . .In contrast to the facts of the above cases, the record is devoid of any facts which would have justified the opening of the sealed container at issue. To presume that the mere identification of the purpose of a consent search in and of itself grants a police officer the right to search sealed containers within the general area agreed to by the defendant is unreasonable and impermissable under the Fourth and Fourteenth Amendments.
>
> *Shelton, supra* at 238 (Resp. App. A-7).

The Florida Third District Court of Appeal concluded its opinion in the instant case by certifying to the Florida Supreme Court the question concerning the lawfulness of searching a closed container after consent has been given to search the motor vehicle where the container is found. *State v. Jimeno*, 550 So.2d 1176, 1177 (Fla. 3d DCA 1990).

The Florida Supreme Court accepted the State's, Petitioner herein, petition for discretionary review of the certified question, and the Florida Supreme Court based on *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd* 110 S.Ct. 1632 (1990) approved the decision of the Third District Court of Appeal. *State v. Jimeno*, at

____, So.2d ____, 15 F.L.W.S., No. 75,057 (Fla. July 26, 1990). (Resp. App. A-1).

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE SCOPE OF A SEARCH OF THE MOTOR VEHICLE FOR NARCOTICS DOES NOT EXTEND TO CLOSED CONTAINERS IS CONSISTENT WITH DECISIONS OF THIS COURT, THE UNITED STATES COURTS OF APPEAL, AND THE APPELLATE COURTS OF OTHER STATES.

The Trial Court, contra to Respondents' arguments below agreed with the State that the vehicle occupied by the Respondents was lawfully stopped and that Officer Trujillo obtained valid and voluntary consent to search the vehicle. (Resp. App. A-5, A-6). However, the Trial Court in its Order stated that Trujillo did not have authority to search the contents of the bag where the drugs were found because the officer's lawful right to search the vehicle was based solely on consent which did not allow him to search the bag. The Trial Court specifically found that without the officer having any probable cause, or other circumstances existing which would justify the search beyond that defined by the terms of the consent, that then the officer exceeded the bounds of his authority when he opened and searched the contents of the bag. (Resp. App. A-5, A-6).

The Supreme Court of Florida agreed with the Trial Court's application of the former Court's decision in *State v. Wells*, 539 So.2nd 464 (Fla. 1989) as requiring suppressing the evidence in the instant case. *State v. Jimeno*, at ____ So. 2nd ____, 15 F.L.W. S 2412, No. 75, 057 (Fla. July 26, 1990). (Pet. App. A-1).

Although the Petitioner sought and obtained review by this Court of the Florida Supreme Court decision in *Wells*, the Petitioner did not seek review by this Court of that portion of the *Wells* decision addressing the scope of a search authorized by consent. Nevertheless, the Petitioner in the instant case is requesting that this Court revisit *Wells* as it applies to the scope of consensual searches. Petitioner's brief at 7-9. Therefore the Petitioner is not only seeking the granting of a writ of certiorari to review the decision in the instant case, but the force and logic of its argument is that this Court review that portion of the decision in *Wells* which the Petitioner chose not to seek review of when *Wells* was decided by this Court last term. *Florida v. Wells*, 58 U.S.L.W. 4454, 110 S.Ct. 1632, 105 L.E.D.2nd 692 (decided April 18, 1990). Respondents submit that due to the passage of time since the Florida Supreme Court decision in *Wells* and the Petitioner's not seeking review of that decision as it applies to consensual searches, that it is improper for the Petitioner to request review of the instant case by claiming that the decision in *Wells* is erroneous.

The Petitioner is clearly mistaken when it asserts that the Court below like the Court in *Wells* erroneously differentiated the scope of a consensual search from the scope of a search authorized by probable cause. According to the Petitioner the proper

scope of a consensual search is just as broad as a search authorized by a warrant or probable cause. Petitioner's brief at 7. As shown below, the Petitioner's assertions are based on its misinterpretation and misstatement of the language in the decisions of this Court, the United States Courts of Appeal, and Appellate Courts of other states.

In *State v. Wells*, 539 So.2nd 464 (Fla. 1989) The Supreme Court of Florida affirmed the supression of the evidence found in a closed container because the consent given to search the vehicle, which led to the discovery of the container, did not permit the officers to open or look inside closed containers. *Id.* at 468. The Court did not accept the State's proposition that the decision in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.E.D.2nd 572 (1982) defining the scope of searches conducted based upon probable cause, be applied equally to define the scope of searches authorized by consent. *Wells*, at 466. The Court reasoned that the principles that apply to probable cause searches are totally incongrous to the freedom of choice inherent in consensual searches.

> . . . . A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. On the other hand, a probable cause search and its scope are compelled no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the Defendant had said "You can look in my car but not in my trunk". *Wells*, at 467.

The Petitioner is mistaken when it states that the Court in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.E.D.2nd 572 (1982) intended to apply its decision there to define the scope of searches made without probable cause. Petitioner's brief at 9. The Court in *Ross* expressly limited itself to cases where there was probable cause to justify the search. *Id.* at 456 U.S. 800, 809, 825. In fact, the Court in *Ross* expressly distinguished the facts in *Ross* when it approved its earlier decision in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2746, 53 L.E.D.2nd 538 (1977) because in *Chadwick* there was no probable cause to justify the search. *Ross* at 456 U.S. 817.

The Petitioner incorrectly argues that the decision in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.E.D.2nd 854 (1973) recognized that the scope of a consent search is the same as in a probable cause setting. Petitioner's brief at 7. In *Schneckloth* the Court did not address the scope of a consensual search because the only issue before it was whether the consent to search was voluntarily given. *Id.* at 412 U.S. 222, 223. Therefore, the decision in *Schneckloth* does not present any conflict with the decision of the Court below in the instant case.

Contrary to the Petitioner's assertion the decision in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.E.D.2nd 410 (1980) does not hold that the scope of a consensual search is equal to the scope of a probable cause search. In fact, the decision in *Walter*

supports the decision below in the instant case because the Court in *Walter* expressly differentiated the scope of a search authorized by probable cause from the scope of a search authorized by consent.

> . . . .When an official search is properly authorized whether by consent or by the issuance of a valid warrant the scope of a search is limited by the terms of its authorization. *Walter* at 447 U.S. 657.

The Court in *Walter* explained that since the practice of general exploratory searches conducted pursuant to open-ended warrants were the immediate evils sought to be abolished by the framers of the fourth amendment, that then the scope of every search must be limited by the terms of its particular authorization, whether that be the issuance of a search warrant or any of the five exceptions to the warrant requirement. *Walter* at 447 U.S. 657.

The Petitioner's blanket assertion that decisions of this Court conflict with the decision of the Court below is not only not supported by the cases it cites in its brief, but also other decisions of this Court clearly support the decision in the Court below. In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.E.D.2nd 538 (1977) the Court decided that due to the significant differences existing between searches conducted upon probable cause from those conducted without probable cause that allowing the scope of searches to be the same in both instances would invite violations of the Fourth Amendment.

> . . . . In warrantless searches the salutary limits of limits of the warrant do not exist, and therefore the scope of a warrantless search must be determined on other basis. *Chadwick* at 433 U.S. 10.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.D.2nd 889 (1968) the Court addressed the scope of a search made without probable cause, and based upon the officers suspicion of the Defendant being involved in criminal activity. The Court held that when an officer suspects an individual of being involved in criminal activity, but has no probable cause supporting his suspicions, then the officer's search of the individual must be limited to the purpose behind the search which is to assure the officer's safety. The Court reasoned that the scope of the search in this situation must be defined and tied to the circumstances which rendered its initiation permissable. Otherwise, the officer would have free rein to conduct a search not justified by the circumstances, and this would be in violation of the Fourth Amendment. *Id.* at 19, 26.

Likewise, in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 25 L.E.D.2nd 685 (1967) the Court limited the scope of a search incident to an arrest to that area where weapons could be obtained by the Defendants or evidence could be destroyed by the Defendants. *Id.* at 764. The Court repeated that the scope of a search must be in any case defined by the circumstances justifying it. *Id.* at 768.

Although the Court was not given the opportunity to address the scope of the consensual search when it granted the Petitioner's request for a writ of certiorari

in *Florida v. Wells*, 58 U.S.L.W. 4454, 110 S.Ct. 1632, 105 L.E.D.2nd 692 (decided April 18, 1990), the Court's holding is consistent with the decisions discussed here, and with the decision in the Court below. In *Wells*, this Court held that the scope of a motor vehicle inventory search was exceeded when the search extended to a closed container because the agency conducting that search did not have any policy providing for the opening and searching of closed containers in inventory situations. The Court reasoned that there must be standardized criteria to regulate the opening of containers found during inventory searches in order to prevent the transformation of an inventory search into a ruse for general exploratory searches conducted to discover incriminating evidence. *Wells*, at 110 S.Ct. 1635. Again, this Court held that the scope of any search must be defined by the terms of its authorization when it stated in *Wells*.

> . . . ."Inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of loss, stolen, or vandalized property, and to guard the police from danger . . . The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment. *Wells* at 110 S.Ct. 1635".

Thus, the Petitioner is wholly mistaken in its assertion that decisions of this Court conflict with the decision of the Court below in the instant case.

The Petitioner states that decisions of the United States Court of Appeal conflict with the decision below.

In support of this proposition the Petitioner cites six Federal Circuit Court of Appeals opinions which in fact do not conflict with the decision below.

First, the Petitioner claims that *United States v. Dichiarnte*, 445 F.2d 126 (7th C.C.A. 1971) conflicts with the decision below. However, that the facts in *Dichiarnte* did not involve the search of a closed container, and the only issue there was whether the officers were authorized to seize papers in plain view. Nevertheless the Court did disapprove of officers seizing items which were not in plain view where the consent to search did not allow them to search beyond the open area. *Id.* at 130–131.

The Petitioner's use of *United States v. Ware*, 890 F.2d 1008 (8th C.C.A. 1989) in support of its petition in the instant case is equally misplaced. In *Ware* the Defendant had signed a written consent form which specifically permitted the officers to search his entire apartment. *Id.* at 1011. In the instant case the consent was oral and the Trial Court specifically found that the officer never obtained permission to search any containers. (Resp. App. A–5). Also, the Court in *Ware* upheld the search of the closed trunk found in the Defendant's apartment premises only because the Defendant had given the officers the key to open the trunk and thereby invited the officers to search the contents of the trunk. *Id.* at 1011.

The Petitioner then cites *United States v. McBean*, 861 F.2d 1570 (11 C.C.A. 1988). This case again does not support the Petitioner's argument. In *McBean* the Court did not address the scope of the search because it was not required to do so after having

determined that the Defendant lacked standing to contest the search. *Id.* at 1573. Nevertheless, the Court did take the opportunity to state in its opinion that the scope of a consent search is limited by the scope of the consent given in each case, in the same way that the scope of a search based upon a warrant is limited by the terms of the warrant. *Id.* at 1573.

The fourth United States Court of Appeal decision cited by the Petitioner is *United States v. Strickland,* 902 F.2d 937 (11 C.C.A. 1990). In *Strickland* the Court did not approve the search of the inside of the tire based on the consent given to search the automobile where the tire was found, but the basis of the Court's decision was that the officers having obtained probable cause to search the inside of the tire during their search of the automobile was the only lawful basis to search the inside of the tire. Without that probable cause then the search would have exceeded the bounds of the consent and the Trial Court's Order suppressing the evidence would have been upheld. *Id.* at 941.

In the instant case the officers never had probable cause to search the Respondent's automobile or any contents therein. (Res. App. A-5).

The Petitioner's use of *United States v. Anderson,* 859 F.2d 1171 (3rd C.C.A. 1983) and *United States v. Kapperman,* 764 F.2d 786 (11 C.C.A. 1985) does not support the Petitioner's proposition that there exists a conflict with the decision below. In both of these cases the officers obtained written consent which clearly gave them authority to conduct a complete search including searching containers.

Finally, the decision in *United States v. White,* 706 F.2d 806 (7 C.C.A. 1983), discussed by Petitioner in its brief at 13, is an abberation which is not supported by the decisions of this Court, and therefore does not warrant the granting of the petition here.

The Petitioner discusses *Gamble v. State,* 318 Md. 120, 567 A.2d 95 (1989), and *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) to support its proposition that there is a conflict among the Appellate Courts of other states and the decision below. However, in *Gamble* the Court upheld the search of a gym bag because of the Trial Court's findings that under the circumstances the scope of the consent to search extended to the contents of the gym bag. *Gamble* at 567 A.2d 100. In the instant case the Trial Judge expressly found that the consent to search the automobile did not extend to a search of the contents of the bag. (Resp. App. A-5). Therefore, the decision in *Gamble* is totally distinguishable from the decision in the instant case.

The decision in *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) supports the decision in the instant case, and does not provide any support to the petition here. In *Huether* the Supreme Court of North Dakota affirmed the lower Court's Order suppressing the evidence because the officers exceeded the scope of the Defendant's consent to search the Defendants automobile for open containers when they looked inside a paper bag which was partially pushed under the front passenger seat. Again, the Court repeated the language discussed in the above cited opinions when it said that officers conducting a search pursuant to consent must limit the scope of their search to that which the consent provides. *Huether* at 783.

Based on the opinions discussed by the Petitioner in its petition and other opinions of this Court discussed in this brief the decision below does not conflict with decisions of this Court, the United States Courts of Appeal, or Appellate Courts of other states. In fact, the decision of the Court below is wholly supported by the decisions of this Court, the United States Courts of Appeal and Appellate Courts of other states.

CONCLUSION

Based on the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to review the decision below.

Respectfully Submitted,

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[FILED JULY 26, 1990]

SUPREME COURT OF FLORIDA

No. 75,057

STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO, et al.,

Respondents.

GRIMES, J.

We accepted jurisdiction[1] to review *State v. Jimeno*, 550 So.2d 1176 (Fla. 3d DCA 1989), wherein the district court of appeal certified as being of great public importance a question concerning the lawfulness of searching a closed container after consent has been given to search a motor vehicle for narcotics.

We agree with respondents that under *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd*, 110 S.Ct. 1632 (1990), the consent to search a vehicle does not extend to a closed container found inside the vehicle.

Therefore, we approve the decision of the district court of appeal.

It is so ordered.

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[1]Art. V, § 3(b)(4), Fla. Const.

SHAW, C.J., and OVERTON, EHRLICH, BARKETT and KOGAN, JJ., Concur

McDONALD, J., Diseents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1989

CASE NO. 89-888

THE STATE OF FLORIDA,

Appellant,

vs.

LUZ PIEDAD JIMENO and ENIO JIMENO,

Appellees.

Opinion filed October 24, 1989.

An Appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Sidney Efronson and Ramon Tourgeman and Calianne P. Lantz, for appellees.

Before BARKDULL, NESBITT, and JORGENSON, JJ.

PER CURIAM.

The state appeals from an order granting defendants' motion to suppress physical evidence. We affirm.

The question presented in this appeal is whether a concededly valid consent to search a motor vehicle for narcotics permits a search of a closed paper bag found on the front floor of the passenger side of that car. The trial court found that even though the officer advised defendants that he wanted to search the vehicle for illegal drugs, defendants never specifically consented to a search of the rolled-up bag. Based on that finding, the trial court concluded that the scope of the consent given did not extend to the search and seizure of the bag.

This court has held that consent to a general search for narcotics does not extend to "sealed containers within the general area agreed to by the defendant." *Shelton v. State*, No. 87-1883 (Fla. 3d DCA Sept. 26, 1989). We decline to depart from the holding and rationale of *Shelton*;[1] we certify to the Florida supreme court the same question certified in *Shelton*.

Affirmed.

[1]As in *Shelton*, here, viewing the totality of the circumstances, "the record is devoid of any facts which would have justified the opening of the sealed container at issue." *Id.*

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance

Third District—Case No. 89-888

(Dade County)

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, Miami, Florida,

for Petitioner

Sidney Efronson and Ramon Tourgeman of the Law Offices of Sidney Efronson, Miami, Florida,

for Respondents

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 88-23967

THE STATE OF FLORIDA,

Plaintiff,

vs.

ENIO JIMENO, CESAR TABARES, LUZ JIMENO,
Defendants.

ORDER GRANTING MOTION TO SUPPRESS AS TO DEFENDANT, ENIO JIMENO, and DEFENDANT, LUZ JIMENO

ORDER DENYING MOTION TO SUPPRESS AS TO DEFENDANT, CESAR TABARES

On March 2, 1989, the Court heard the defendants' motions to suppress. None of the three defendants was present and counsel agreed to waive their presence.

Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:

1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment

complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.

2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, if fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, see *State v. Wells*, 13 Fla.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted.*

However, as to defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

DONE AND ORDERED in chambers at Miami, Dade County, Florida this 21 day of March, 1989.

/s/ FREDRICKA G. SMITH
FREDRICKA G. SMITH
CIRCUIT COURT JUDGE

Copies furnished to:
Sidney Efronson, Esq.
Juan Vargas, Esq.

Cervantiz A. SHELTON, Appellant,
v.
The STATE of Florida, Appellee.
No. 87-1883.
District Court of Appeal of Florida,
Third District.

Sept. 26, 1989.

Defendant was convicted of trafficking in cocaine before the Circuit Court, Dade County, Mario P. Goderich, J. She appealed. The District Court of Appeal, Nesbitt, J., held that scope of defendant's consent to search her tote bag did not extend to consent to search contents of gift-wrapped package found inside bag.

Reversed and remanded.

1. Searches and Seizures —186

Scope of consent search is limited to extent of permission given, as determined by totality of circumstances. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures —172

Acquiescence in apparent authority of police to perform search is not sufficient to establish valid con [ILLEGIBLE] C.A. Const. Amend. 4.

3. Searches and Seizures —186

Train passenger's consent to search her tote bag did not extend to consent to search contents of gift-wrapped package inside bag; officers did not request permission to unwrap package. U.S.C.A. Const. Amend. 4.

Bennett H. Brummer, Public Defender, and N. Joseph Durant, Jr., Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Julie S. Thornton, Asst. Atty. Gen., for appellee.

Before NESBITT, JORGENSON, and COPE,* JJ.

On Motion for Rehearing

NESBITT, Judge.

We deny appellee's motion for rehearing and substitute the following for the opinion released July 11, 1989 in order to clarify a point of law.

The defendant appeals the denial of her motion to suppress evidence obtained pursuant to a consent search and her subsequent conviction for trafficking in cocaine. We reverse.

---

*Judge Cope did not participate in oral argument.

At a Miami Amtrak station, narcotics officers approached Cervantiz Shelton after they observed her boarding a sleeping car of a train bound for Washington, D.C. with only a small tote bag and a purse. The officers identified themselves and explained that they were investigating the movement of narcotics out of Florida. Shelton was asked for identification. She produced a driver's license and a train ticket which were returned to her. She then consented to a search of her bags after being advised of her right to refuse the search request. Upon finding a very heavy, small, gift-wrapped box under some clothing in the tote bag, one officer picked up the box and began to carefully remove the wrapping. Shelton remained silent during this procedure. In the box, a kilo of cocaine was found. Shelton was charged with trafficking in the contraband. The defendant's motion to suppress the cocaine was denied, and she was subsequently found guilty of the charge. She now appeals claiming her consent to search the tote bag did not extend to consent to search the contents of the gift-wrapped package within that bag. We agree.

[1, 2] A property search conducted without a warrant and without probable cause is constitutionally invalid. However, an otherwise unreasonable search becomes reasonable upon consent to search being granted subject to a few specifically established and well delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The scope of a consent search is limited to the extent of the permission given, as determined by the totality of the circumstances. *State v. Wells*, 539 So.2d 464 (Fla. 1989); *Martin v. State*, 411 So.2d 169 (Fla. 1982); *State v. Fuksman*, 468 So.2d 1067 (Fla. 3d

DCA 1985). Acquiescence in the apparent authority of the police to perform a search is not sufficient to establish valid consent. *Correa v. State*, 389 So.2d 1204 (Fla. 3d DCA 1980), *review denied*, 399 So.2d 1146 (Fla. 1981); *Major v. State*, 389 So.2d 1203 (Fla. 3d DCA 1980), *review denied*, 408 So.2d 1095 (Fla. 1981).

[3] The evidence here establishes that the defendant consented to a general search of her tote bag for narcotics. However, the scope of the consent did not extend to the unwrapping of the sealed box. There is no evidence to suggest either that the officers requested permission to unwrap the package or that Shelton consented to their search of the gift-wrapped box. As stated in *Wells*:

> When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis.

539 So.2d at 467.

There are cases where courts have found sufficient facts to constitute a basis for opening sealed containers pursuant to a search undertaken with the consent of the defendant. Some deal with the presence of probable cause. For example, in *State v. Cross*, 535 So.2d 282 (Fla. 3d DCA 1988), during a consensual search of luggage for narcotics, the presence of a taped, baseball-shaped object, which in the detectives' experience was a

common way to package cocaine, provided the probable cause necessary to seize the object which was found to contain cocaine. *See Palmer v. State*, 467 So.2d 1063 (Fla. 3d DCA 1985) (police discovery of "distinctively wrapped, shaped, and sized packages" constituted probable cause to believe narcotics were present and thus to authorize search of defendant's package incident to arrest). Other cases upholding seizures pursuant to consent searches are based on a finding that, when viewed in the totality of the circumstances, the scope of consent extended to the object where contraband was found. *See Rosa v. State*, 508 So.2d 546 (Fla. 3d DCA), *review denied*, 515 So.2d 230 (Fla. 1987).

In contrast to the facts of the above cases, the record in this case is devoid of any facts which would have justified the opening of the sealed container at issue. To presume that the mere identification of the purpose of a consent search in and of itself grants a police officer the right to search sealed containers within the general area agreed to by the defendant is unreasonable and impermissible under the Fourth and Fourteenth Amendments. *See Wells*, 539 So.2d at 468, *Hutchinson v. State*, 505 So.2d 579 (Fla. 2d DCA 1987), *review dismissed*, 519 So.2d 603 (Fla. 1988); *Fuksman*, 468 So.2d at 1070.[1]

Accordingly, the trial court erred in denying the motion to suppress.

However, in view of the fact that the United States Supreme Court has granted a petition for certiorari

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[1]Preliminary to issuing this opinion, this court held an en banc hearing to determine whether [COPY MISSING]

review of *State v. Wells*, [*Florida v. Wells*, ____ U.S. ____, 109 S.Ct. 3183, 105 L.Ed.2d 692 (1989)], we certify the question discussed herein to the Supreme Court of Florida because of our lingering doubts as to the state of the law on this issue.

Reversed and remanded.

(3)

No. 90-622

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA, PETITIONER

v.

LUZ PIEDAD JIMENO and ENIO JIMENO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the police violated the Fourth Amendment when, after obtaining consent to search respondents' automobile for drugs, they opened a paper bag that they found lying on the floor in the passenger compartment of the car.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the scope of a general consent to search an automobile when the consenting party puts no special limitations on his consent. This issue has arisen, and can be expected repeatedly to arise, in prosecutions under a number of federal statutes, including those involving drug and firearms offenses. See, *e.g.*, *United States* v. *Anderson*, 859 F.2d 1171 (3d Cir. 1988); *United States* v. *Kapperman*, 764 F.2d 786, 794 (11th Cir. 1985); *United States* v. *Covello*, 657 F.2d 151, 155 (7th Cir. 1981). The United States therefore has a direct and substantial law enforcement interest in the disposition of this case.

STATEMENT

1. On the afternoon of July 20, 1988, Miami police officer Frank Trujillo saw respondent Enio Jimeno and his wife, respondent Luz Jimeno, drive into a parking lot and get out of their car. Co-defendant Cesar Tabares, who was sitting in the back seat, also got out of the car at that time. Enio Jimeno made several telephone calls from a pay telephone; Officer Trujillo overheard part of one of the conversations, which made him suspect that the Jimenos were engaged in drug trafficking. Pet. App. A5-A6; Suppression Hearing Tr. 15-19.

The Jimenos and Tabares returned to the car and drove to a nearby apartment complex. After the Jimenos and Tabares had been inside the apartment building for a few minutes, Tabares returned to the car, picked up a brown paper bag with a colored fabric around it, and went back into the building. After about 15 to 20 minutes, the two Jimenos and Tabares returned to the car. Enio Jimeno was carrying a briefcase and the brown paper bag that Tabares had taken into the apartment. As they got into the car, Enio Jimeno gave Tabares the paper bag. Tabares took the fabric off the bag and handed it back to Luz Jimeno, who was sitting in the front passenger seat. She put the bag on the floorboard of the car at her feet. Pet. App. A6; Suppression Hearing Tr. 20-21.

Officer Trujillo followed the car as it left the apartment complex. He pulled the car over after he saw it make a right turn at a red light without stopping. Pet. App. A6; Suppression Hearing Tr. 21-22.[1] Enio

[1] Following a suppression hearing at which Officer Trujillo was the only witness, the trial court made findings of fact, Pet. App. A5-A6, including that the traffic stop was valid and could have been made even apart from the suspected drug trafficking, Pet. App. A6.

Jimeno got out of the car and walked toward Officer Trujillo. Officer Trujillo identified himself as a police officer, told Jimeno he had run a red light, and asked to see Jimeno's driver's license. Suppression Hearing Tr. 22. After examining the license, Officer Trujillo said (*id.* at 23):

> Sir, Mr. Jimeno, the reason I'm stopping you—in addition to the traffic infraction, I am conducting a narcotics investigation where I have suspicion to believe you are carrying narcotics in your car.

Officer Trujillo then asked Jimeno for permission to search the car. He explained that Jimeno did not have to consent to a search of the car, that Jimeno did not have to speak with him, and that Jimeno was free to leave at any time. Officer Trujillo added that if Jimeno did consent to a search of the vehicle, he could tell the officers to stop at any point during the search.[2] Jimeno then gave his consent to a search of the automobile. According to Officer Trujillo, Jimeno "said he had nothing to hide, we could go ahead and search the vehicle." Pet. App. A6; Suppression Hearing Tr. 23-24.[3]

[2] Officer Trujillo said that if Jimeno did not consent to a search, the officers would seek a search warrant, but he added that a warrant would not necessarily be issued, because the judge presented with a request for a warrant could refuse to issue one. Suppression Hearing Tr. 23.

[3] Before requesting Jimeno's consent to search the car, Officer Trujillo determined that Jimeno and his wife owned the car. Suppression Hearing Tr. 24. It is undisputed that Jimeno had the authority to consent to a search of the car and that it was therefore unnecessary for Officer Trujillo to

After the other two passengers got out of the car, Officer Trujillo went to the passenger side, opened the door, and saw the brown paper bag on the floorboard. The bag was rolled up, so that its contents could not be seen without unfolding and opening it. Pet. App. A6; Suppression Hearing Tr. 24, 37, 48, 49. Officer Trujillo picked up the bag, opened it, and found a kilogram of cocaine inside. Suppression Hearing Tr. 26-28.

2. Following an evidentiary hearing on respondents' motion to suppress the cocaine, the trial court found that Jimeno had freely consented to the search of the car. In addition, the court found that Officer Trujillo had advised Jimeno that he wanted to search the vehicle because he was looking for illegal drugs, and the court acknowledged that respondent "could have assumed that the officer would have searched the bag." Pet. App. A6. Nonetheless, the court suppressed the cocaine. The court found that Officer Trujillo never specifically requested permission "to open the bag and examine the contents," and that respondent "did not specifically consent to the search of the bag." Citing the Florida Supreme Court's decision in *State* v. *Wells*, 539 So. 2d 464 (1989), aff'd on other grounds, 110 S. Ct. 1632 (1990), the trial court concluded that, absent a specific consent to search the bag, "the scope of the consent given did not extend to the search and seizure of the bag," Pet. App. A6, and that the search of the bag was therefore unlawful.[4]

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obtain consent for the search from respondent Luz Jimeno as well. See *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974).

[4] The court denied the motion to suppress as to Tabares on the ground that he lacked standing to object to the search. Pet. App. A7.

3. On the State's appeal, the district court of appeal affirmed the grant of the suppression motion. Pet. App. A3-A4. The court held that "a concededly valid consent to search a motor vehicle for narcotics" does not permit "a search of a closed paper bag found on the front floor of the passenger side of that car," *id.* at A3, because "consent to a general search for narcotics does not extend to sealed containers within the general area agreed to by the defendant." *Id.* at A4 (internal quotation marks omitted). The court then certified the question to the Florida Supreme Court for review. *Ibid.*

4. The Florida Supreme Court affirmed in a brief opinion, with one justice dissenting. Pet. App. A1-A2. The court stated that the case was controlled by its previous decision in *State* v. *Wells*, *supra*, and agreed that "consent to search a vehicle does not extend to a closed container found inside the vehicle." Pet. App. A1.

In the *Wells* case, on which the Florida Supreme Court based its ruling in this case, the defendant had consented to a search of the trunk of his car. Upon obtaining access to the trunk with the defendant's permission, the police discovered a locked suitcase. Without seeking the defendant's permission to enter the suitcase, the police forced the lock and opened it, finding marijuana inside. The Florida Supreme Court ordered the marijuana to be suppressed. It held that if the terms of the consent to search a vehicle do not "convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis." Pet. App. A13. The *Wells* court concluded that "the general consent to look in an automobile trunk * * * did not constitute permission to pry open a locked piece of luggage found inside." Pet. App. A14.

SUMMARY OF ARGUMENT

Respondent Enio Jimeno consented, voluntarily and without restriction, to having a police officer search his car for drugs. If a magistrate had issued a warrant to search the car for narcotics, or if the officer had searched the car on probable cause under the "automobile exception" to the warrant requirement, the officer undoubtedly could have opened the paper bag he found inside the car during the search. The paper bag would be within the scope of the authority to search because, absent some express or implied limitation, the search of a car is reasonably understood to contemplate not only an examination of the interior features of the car itself, but also an examination of any containers found inside the car that might contain the objects for which the search was authorized.

The same principle should govern the scope of a consent search. Because the search of a car is ordinarily understood to contemplate the search of containers found within it, the search of closed but unsealed containers should be regarded as within the scope of a general consent to search a car, as long as the consent is not limited, expressly or by implication, to exclude such containers. That principle applies with special force in a case such as this one, where the police have told the consenting person what they are looking for before they obtain consent to search, and where the container in question could reasonably be expected to contain the object of the search.

The Florida Supreme Court committed error when it adopted a per se rule that "the consent to search a vehicle does not extend to a closed container found inside the vehicle." Pet. App. A1. It is reasonable to conclude that a general consent to search a car

ordinarily does not authorize police to break open a locked container or take other steps that result in significant property damage. That is because a person consenting to a search would not ordinarily be understood to consent to the destruction of a suitcase or other locked container without explicitly permitting such measures. But when a person consents to the search of an automobile, especially a search for items such as drugs that are usually kept in containers, the authorization to search would ordinarily be understood to embrace the right to look into closed containers found within the automobile, if opening those containers involved no significant damage to property. In light of that understanding, and in the absence of some express or implied restriction on the scope of the consent granted in a particular case, closed but unsealed containers found in an automobile may lawfully be opened as part of a consent search of the car.

ARGUMENT

A GENERAL AND UNRESTRICTED CONSENT TO SEARCH A CAR AUTHORIZES THE OPENING OF CLOSED CONTAINERS FOUND DURING THE SEACH

The issue in this case is how broadly to construe a general consent to search a car, where there is no express or implied limitation on the scope of the search. In particular, the case presents the question whether police who obtain a general consent to search an automobile for narcotics may open a closed but unsealed container that they find in the passenger compartment. In our view, the principles underlying the law of consent searches compel an affirmative answer.

A. The Scope Of A Consent Search Depends On The Terms Of The Authorization, Objectively Viewed

The Fourth Amendment forbids the police from conducting "unreasonable" searches or seizures. A search that is conducted pursuant to consent is considered "reasonable" even if it is conducted without either a warrant or probable cause. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973). As this Court stated in *Schneckloth*, 412 U.S. at 242-243, "[w]hile the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search." Indeed, because "the community has a real interest in encouraging consent," *id.* at 243, this Court has consistently regarded a "properly conducted" consent search as a "constitutionally permissible and wholly legitimate aspect of effective police activity."

As the Court has explained, consent searches play a unique and valuable role in law enforcement. "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Schneckloth*, 412 U.S. at 227. In part for that reason, the Court has rejected the argument that "every reasonable presumption ought to be indulged against" a finding of consent, *id.* at 243, and it has held that while the government bears the burden of proving a valid consent, it need only satisfy a preponderance of the evidence test rather than some higher standard, *United States* v. *Matlock*, 415 U.S. 164, 177-178 n.14 (1974).

Although consent cases often turn on whether the consent was validly obtained, an issue sometimes

arises as to the scope of the consent that was given. In *Walter* v. *United States*, 447 U.S. 649, 656 (1980) (plurality opinion), Justice Stevens set forth the principle that controls such cases: "When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization." A consent to search renders police action reasonable, and thus not in violation of the Fourth Amendment, as long as the police respect the terms of the consent. If the consenting individual limits his consent—whether by withdrawing it, by restricting the area of the search, or by limiting the duration or the intensity of the search—the police must respect the limitations imposed. That is because a consent search that exceeds the apparent scope of the consenting party's authorization becomes a warrantless invasion of privacy without probable cause and is thus unlawful unless there is some other justification for the search. See *United States* v. *Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir. 1985); *Mason* v. *Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977).

In some cases, the limitations on the scope of the consent are implied rather than express, but the limitations must still be respected. See, *e.g.*, *United States* v. *Dichiarinte*, 445 F.2d 126 (7th Cir. 1971) (consent to search home for narcotics held not to authorize police to open and read documents found in the course of the search). The task of the courts in such cases is to determine the scope of the consent in light of the terms and context in which the consent was requested and given.

Sometimes the terms and context of the consent are not particularly enlightening. The police may

simply request consent to search a particular area, and the individual may grant the consent without suggesting any particular limitation on the conduct of the search. In those cases, the court must determine what a reasonable officer would understand to be the scope of the consent. The test is an objective one. Even if an individual subjectively intends to consent to only a limited search, the police do not violate the reasonableness requirement of the Fourth Amendment if they act in accordance with what an objective viewer, knowing all the facts, would understand to be the scope of the consent granted. See *Illinois* v. *Rodriguez*, 110 S. Ct. 2793, 2799-2801 (1990) (police do not violate the Fourth Amendment if they reasonably believe a person has authority to consent to a search of a particular place, even if that belief turns out to be wrong).

B. A General Consent To Search A Car For Narcotics Authorizes The Search Of All Containers Inside The Car That Might Contain Narcotics And Can Be Opened Without Causing Property Damage

Where, as in this case, there is nothing to indicate that the consenting individual wished to restrict the scope of the search, the limits on the police officers' conduct must be defined by reference to generally shared expectations about what a consenting party authorizes the police to do when he consents to a search. While that question may be difficult to answer in the abstract, we believe that it can be answered with some specificity in certain commonly arising cases, such as a consent search of a car for drugs. In that setting, an unqualified consent to search the car should ordinarily be construed to permit the police to examine any closed containers within the car that could be used as receptacles for drugs and can be opened without causing significant property damage. That conclusion flows from this Court's analysis in closely related contexts as well as from principles applicable to the execution of searches generally.

1. In *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982), this Court addressed the scope of authority to conduct a search of a vehicle under the "automobile exception" to the Fourth Amendment's warrant requirement. *Ross* established the principle that a warrantless search of an automobile based on probable cause extends to closed containers "that may conceal the object of the search." *Ross*, 456 U.S. at 825.

The police in *Ross* stopped a car after being told by an informant that it contained narcotics. In the trunk, the officers found a closed paper bag. Inside the bag were glassine bags filled with heroin. After finding that the search was supported by probable cause that would justify the issuance of a warrant, the Court upheld the lawfulness of the search —including the opening of the paper bag discovered in the trunk.

The Court explained that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." 456 U.S. at 820-821. The Court supported its holding by noting, *id.* at 820 n.26, that "[d]uring virtually the entire history of our country—whether contraband was transported in a horse-drawn car-

riage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." For example, the Court explained,

> a warrant that authorizes an officer to search a home for illegal weapons * * * provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between * * * glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

456 U.S. at 821. See also *Horton* v. *California*, 110 S. Ct. 2301, 2309-2310 & n.10 (1990); 2 W. LaFave, *Search and Seizure* § 4.10(b), at 317 (1987) ("It is not necessary, in order to comply with the Fourth Amendment requirement that the place to be searched be described with particularity, that the warrant also describe such receptacles" that might contain the objects of the search).[5]

[5] See also, *e.g.*, *United States* v. *Rutkowski*, 877 F.2d 139, 141 (1st Cir. 1989) (because the warrant authorized the officers to look for small items, jewelry, and coins, they were entitled to open a coffee can and some envelopes); *United States* v. *Martinez-Zayas*, 857 F.2d 122, 133 & n.7 (3d Cir. 1988) (warrant to search house for cocaine authorized search of purse inside house); *United States* v. *DeSimone*, 660 F.2d 532 (5th Cir. 1981) (warrant to search car for marijuana authorized search of suitcases discovered there), cert. denied, 455 U.S. 1027 (1982).

Although *Ross* involved a probable cause search, the Court's analysis is instructive with respect to consent searches as well. While consent in some instances can authorize a more extensive search than a warrant,[6] the scope of the officer's authority should not be restricted simply because the authorization for the search derives from the defendant's consent rather than from a magistrate's or a police officer's finding of probable cause. See *Schneckloth* v. *Bustamonte*, 412 U.S. at 243 ("The actual conduct of [a consent] search may be precisely the same as if the police had obtained a warrant."); *United States* v. *McBean*, 861 F.2d 1570, 1573 (11th Cir. 1988) ("The scope of a consent search is defined by the scope of actual consent in the same way that the scope of a search based upon a search warrant is defined by the warrant.").

The *Ross* Court found that where probable cause or a warrant authorizes the search of a car for drugs, the authorization to search containers found within the car is implicit in the authorization to search the car, even when the probable cause does not relate specifically to the containers, and even when the containers are not mentioned in the warrant. The rationale underlying that rule is that whatever is in the container is also in the car, so that the authority to search the container is implicit in the magistrate's authorization or the authorization provided by probable cause to search the car.

[6] For example, an individual's consent to a general exploratory search of his property would be valid, while a warrant must particularize the place to be searched and the things to be seized.

That rationale is equally applicable to a consent search, where the containers are so much a part of the car that the consenting party should naturally expect that they will be searched as part of the search of the car. Thus, when an individual gives the police general, unrestricted permission to search his car for drugs, he cannot reasonably claim to be surprised when the police look in any closed but unsealed containers they may find there. In light of that widely shared understanding, most courts have held that a general consent permits the opening of containers found in the place for which consent was given, particularly in the case of consent searches of cars.[7]

2. In addition to the considerations discussed above, there are other factors that weigh strongly in favor of permitting the search of a container based on a general consent to search a car for drugs. First, in a case such as this one, where the person giving consent is told in advance that the police are looking for drugs, it is entirely reasonable to con-

[7] See, *e.g.*, *United States* v. *Smith*, 901 F.2d 1116, 1118 (D.C. Cir.), cert. denied, 111 S. Ct. 172 (1990); *United States* v. *Battista*, 876 F.2d 201 (D.C. Cir. 1989); *United States* v. *Anderson*, 859 F.2d 1171 (3d Cir. 1988); *United States* v. *Sealey*, 830 F.2d 1028, 1032 (9th Cir. 1987); *United States* v. *Dyer*, 784 F.2d 812, 816 (7th Cir. 1986); *United States* v. *Kapperman*, 764 F.2d 786, 794 (11th Cir. 1985); *United States* v. *Covello*, 657 F.2d 151 (7th Cir. 1981); *Heald* v. *State*, 492 N.E.2d 671, 680 (Ind. 1986); *State* v. *Watson*, 416 So. 2d 919 (La. 1982); *Gamble* v. *State*, 318 Md. 120, 567 A.2d 95 (1989); *People* v. *Mirenda*, 57 N.Y.2d 261, 442 N.E.2d 49, 455 N.Y.S.2d 752 (1982); *State* v. *Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990); *State* v. *Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990); 3 W. LaFave, *Search and Seizure* § 8.1(c), at 161 (1987).

clude that the person's consent extends to containers in which drugs might be found. See *United States* v. *Kapperman*, 764 F.2d 786, 790, 794 (11th Cir. 1985) (after police explained that they were looking for drugs, consent to search vehicle permitted search of unlocked luggage inside "because the officers could reasonably assume that the narcotics would be found there"); see also *United States* v. *White*, 706 F.2d 806, 808 (7th Cir. 1983) (search of flight bag upheld even though defendant's consent to search apartment for drugs did not expressly authorize opening suitcases: "Since the officers could reasonably consider that heroin was in the flight bag, the search of the bag was within the scope of [the defendant's] consent."); *United States* v. *Battista*, 876 F.2d at 207-208 (consent to search for drugs justified a search of containers where contraband could be stored).

Because drugs are often carried in paper bags, a person giving a general consent to a car search for drugs should be deemed to consent to a search of any paper bags or other similar containers found inside the car. Like money or documents, drugs "rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States* v. *Ross*, 456 U.S. at 820. See also *United States* v. *Anderson*, 859 F.2d 1171, 1176 (3d Cir. 1988) (officer searching vehicle "for evidence that the drug laws had been violated could not expect the contraband to be lying in plain view"); *United States* v. *Kapperman*, 764 F.2d at 792 (consent to search car for "documents or items of property" is "consistent with permitting police to

search the unlocked suitcase, as documents or other items of property cannot necessarily be expected to be lying loose in an automobile"); *United States* v. *Covello*, 657 F.2d at 154 (letters and papers "would not be expected to be lying around loose. They would be contained in something"). As one court put it, "[p]ermission to search an automobile is hollow indeed if it does not include permission to search its contents and component parts." *United States* v. *Milhollan*, 599 F.2d 518, 527 (3d Cir.), cert. denied, 444 U.S. 909 (1979).

Second, if the person who consents to the car search is present during the search and does not raise any objection to the search of containers found in the car, the police can reasonably infer that the person's consent to the car search was not meant to exclude containers. See, *e.g.*, *United States* v. *Anderson*, 859 F.2d at 1177 (defendant "stood by and watched" police search bag found in trunk, which is behavior "completely inconsistent with the contention that [the defendant] retained an expectation of privacy" in the bag); *United States* v. *Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986); *United States* v. *Sierra-Hernandez*, 581 F.2d 760, 764 (9th Cir. 1978). Because a person is ordinarily free to withdraw his consent to a search at any time, his failure to do so when the police begin examining containers in his presence is a strong indication that he regards the search of the containers as falling within the scope of his general consent to the search of the car.

Finally, the reasonableness of including container searches within the scope of a consent to search a particular place depends on what is required to gain access to the contents of the containers. If the containers can easily be opened, it is reasonable to treat

them as being within the scope of the consent. On the other hand, if the containers are locked or otherwise sealed in a manner that requires the police to do significant damage to the containers in order to open them, it is far less likely that the individual meant to authorize the police to open the containers. Even a person in a frame of mind to cooperate with the police would not ordinarily accede to the destruction of his property simply to accommodate a police request to conduct a search. For that reason, an officer ordinarily should not assume that a consent to search conveys permission to conduct the search in a way that involves significant property damage.[8] See *United States* v. *Strickland*, 902 F.2d 937, 941-942 (11th Cir. 1990) (consent to search a vehicle does not extend to slashing spare tire); *State* v. *Koucoules*, 343 A.2d 860, 867 (Me. 1974) (consent to search does not implicitly authorize tearing down a wall of a structure). See also 3 W. LaFave, *Search and Seizure* § 8.1(c), at 161 (1987) ("The police do not have carte blanche to do whatever they please. Certainly they may not engage in search activity which involves the destruction of property, and this would seem to bar breaking into locked containers.").[9]

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[8] Insignificant damage, such as removing a piece of tape in a manner that tears the top of the paper bag, would not ordinarily constitute a sufficient degree of damage to call into question whether the consenting individual would have consented to a search that resulted in the loss of property. The case is likely to be different when the police find it necessary to ruin a briefcase or, to take an extreme case, cut a hole through the body of a car with an acetylene torch in order to execute the search.

[9] This point, we believe, explains the Florida Supreme Court's earlier decision in *State* v. *Wells*, 539 So. 2d 464 (Fla. 1989), aff'd on other grounds, 110 S. Ct. 1632 (1990). In

3. In light of these considerations, we submit that the Florida Supreme Court fell into serious error when it adopted a per se rule that consent to search a vehicle does not extend to a closed container found within the vehicle, and particularly when it applied that rule to a search having the announced purpose of finding drugs. This new, sweeping rule fails to take into account any of the analysis we have discussed above: it fails to acknowledge the ordinary scope of searching authority in the analogous setting of a probable cause search or a search pursuant to a warrant; it disregards what this Court has found to be the ordinary understanding of the scope of a search of an automobile; and it ignores the special considerations that apply to consent searches of automobiles for drugs. Far from justifying a per se rule barring the search of closed containers, the considerations discussed above suggest that the ordinary rule should be quite the opposite: that absent an express or implied limitation on the scope of the search, a consent to search a vehicle for narcotics should authorize the police to open any closed but unsealed containers found within the vehicle. We believe that

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that case, the police obtained a suspect's consent to look into the trunk of his car. Based on that consent, they opened the trunk, encountered a piece of locked luggage, and broke open the locked luggage with a knife. The court in *Wells* repeatedly emphasized the fact that the police had to break into the luggage in order to examine it, and it appears that the court regarded that feature as important to its determination that the police had exceeded the scope of the consent the suspect had given. In this case, the Florida Supreme Court appears to have read the *Wells* decision more broadly, failing to note the feature of property damage that was present in *Wells* and citing *Wells* for the broad proposition that consent to search a vehicle "does not extend to a closed container found inside the vehicle." Pet. App. A1.

this rule best accommodates the competing interests in protecting against unreasonable police interpretations of a consent to search and in ensuring that the essential law enforcement technique of obtaining and exploiting consents to search is not hobbled.

C. The Consent Given In This Case Should Be Construed To Cover The Closed Paper Bag Found On The Floor Of The Car's Passenger Compartment

In this case, Officer Trujillo informed respondent Enio Jimeno that he was looking for narcotics. Thus, the officer's statement had the effect of implicitly limiting the search to containers or compartments that might contain drugs. Since it was reasonable to believe that drugs in the car might be found within the paper bag, it follows that the paper bag was within the scope of the consent given in this case. Moreover, respondent never objected to the conduct of the search, including the officer's search of the paper bag, even though respondent was present at the time.

As we have noted, the test for assessing the validity and the scope of a consent to search is an objective one. The consent should therefore be construed as permitting a search as extensive as a reasonable person would expect the officers to conduct under all the circumstances, taking into account the specific terms and context of the consent. Here, the police officer told respondent he was searching for drugs; respondent then gave the officer general and unrestricted permission to search the automobile. As the trial court conceded, see Pet. App. A6, under these circumstances, respondent Enio Jimeno "could have assumed that the officer would have searched the bag."

The fact that respondent no doubt hoped that Officer Trujillo would not search the bag does not affect the validity or the scope of the consent. It does not, of course, undercut the trial court's determination that it was reasonable for Jimeno to expect that the bag would be searched. Jimeno may have consented to the search for a variety of reasons: he may have believed there was no real hope of escape and have simply decided to capitulate; he may have hoped that the officer, impressed with his cooperative attitude, would overlook the bag or decide not to search at all; he may have forgotten just how conspicuous the bag was in the car; or he may have been planning a defense of lack of knowledge, as to which his ready acquiescence in the request for a search could be put to good effect. Indeed, it may even be that Jimeno consented to the search because he was unaware of what was in the bag and therefore saw no harm in allowing the officer to search the car. But whatever Jimeno's motivation, and whatever his subjective expectations as to the probable scope of Officer Trujillo's search, a reasonable observer would find respondent's consent to be unrestricted, and Officer Trujillo's examination of the bag to be entirely consistent with the authorization to search the car.

Finally, the search of the paper bag in this case did not require or result in damage to property. This is therefore not a case such as *Wells*, in which the state court concluded that breaking open a locked suitcase was not within the scope of the defendant's consent to search the trunk of his car. Under these circumstances, unlike the case where the police must damage a container in order to gain access to it, a reasonable person would not expect the officer to seek further consent before opening the package. The consent that was given in this case should therefore be construed to authorize the search of the paper bag in which the police found the cocaine that formed the basis for the charges in this case.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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No. 90-622

IN THE
Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF OF THE MERITS

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QUESTION PRESENTED

DOES THE SCOPE OF A CONSENT SEARCH EXTEND TO ALL AREAS, INCLUDING CLOSED CONTAINERS, WHICH COULD REASONABLY CONCEAL THE OBJECT OF THE SEARCH, WHEN THE CONSENTING INDIVIDUAL IS ADVISED AS TO THE NATURE OF THE INVESTIGATION AND THE OBJECT OF THE SEARCH.

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A. The Fourth Amendment requires that the scope of a search, whether authorized by warrant, probable cause or consent, be reasonable when viewed by the objective facts which surround the encounter.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 564 So.2d 1083 (Fla. 1990). (Pet. App. 1a-3a).

The opinion of the District Court of Appeal of Florida, Third District, is reported at 550 So.2d 1176 (Fla. 3rd DCA, 1989). (Pet. App. 4a-6a).

The trial court's order granting motion of Respondents, Luz Piedad Jimeno and Enio Jimeno, to suppress evidence is not reported. (Pet. App. 7a-11a).

JURISDICTION

The Supreme Court of Florida's opinion was filed on July 26, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3). On October 15, 1990, Florida filed a petition for writ of certiorari, which this Court granted on December 3, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section 1, United States Constitution provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of

> evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, were the Respondents in the Supreme Court of Florida. The facts of the case, as set forth in the trial court's order granting the motion to suppress, are as follows:

> On March 2, 1989, the Court heard the defendants' motions to suppress. None of the three defendants were present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings.
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.
>
> 3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.
>
> 4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.
>
> 5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.
>
> 6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, i[n] (sic) fact, the officer never requested permission to open the bag and examine the contents.

(Pet. App. 7a-10a).

The trial court in reliance on *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd. on other grounds* 496 U.S. ___, 110 S.Ct. ___, 109 L.Ed.2d 1 (1990), held that the scope of the consent given did not extend to the search and seizure of the bag. The trial court then granted the motion to suppress of Luz Piedad Jimeno and Enio Jimeno. (Pet. App. 10a).

The State appealed this decision to the District Court of Appeal of Florida, Third District. That court affirmed the trial court's suppression of the evidence. The court held that a consent to a search of an area for narcotics does not extend the scope of the consent to a sealed container located within the general area consented to. This holding did not take into account that the container sought to be searched reasonably could have contained the object of the search. The Third District certified to the Supreme Court of Florida, the question of whether the scope of consent extends to a closed

container after consent has been given to search a motor vehicle for narcotics. (Pet. App. 4a-6a).

The Supreme Court of Florida accepted the State's petition for discretionary review based on the certified question. That court approved the decision of the district court and concluded that consent to search the motor vehicle for narcotics was strictly limited to the passenger compartment of the motor vehicle. The scope of the consent did not extend to any containers located within the passenger compartment, regardless of whether the container reasonably could have contained the object of the search, to wit: narcotics. The Supreme Court of Florida relied exclusively on its alternative holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989) *aff'd. on other grounds,* 495 U.S. ___, 110 S.Ct. ___, 109 L.Ed.2d 1 (1990). (Pet. App. 16a-28a).

In *Wells,* the Supreme Court of Florida held that a general consent to open and look into the trunk of an automobile, without informing the occupant of what the police were looking for, was insufficient to authorize the opening of any locked or closed container found in the trunk. The court rejected the State's argument that, pursuant to *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the scope of a consent search extends to every part of the vehicle and its contents that may conceal the object of the search:

> . . . We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

Wells, supra at 467. (Pet. App. 19a-21a).

The dissent found that the majority's interpretation of Ross was overly restrictive and erroneous. While acknowledging that *Ross* would not be authority to exceed the specific scope of a restricted search, the dissent reasoned that the *Ross* analysis is applicable to an unrestricted consent search. (Pet. App. 44a-46a).

SUMMARY OF ARGUMENT

In order to comply with the constitutional mandate of the Fourth Amendment, a valid consent search must in scope be reasonably related to the circumstances which initially authorized the intrusion. To determine if the scope was reasonably related to the consent, the assessment of the facts must be judged against an objective standard. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The objective standard of review will allow neutral judicial scrutiny of the governmental action, reviewable in the same manner as warrant or probable cause searches. The consent, just like probable cause, lawfully places the police in a protected area. A specific request to search an area for a specific object, provides the same particularity requirement as that which is necessary in a warrant. Review will be based on the reasonableness of the police conduct and will not be susceptible to the vagaries of the subjective intent of the consenting individual.

In the instant case, the Respondents were advised that they were suspected of transporting illegal drugs in their vehicle. They then gave consent to a search of their vehicle for illegal drugs. The Florida Supreme Court held that such a consent was limited to looking in the passenger compartment and did not extend to the rolled up brown paper bag found on the compartment's floor. This is totally unreasonable. The consent to search for drugs was not given in the abstract. Rather, it was consent to search for drugs and therefore extended to all items that could reasonably contain illegal drugs. Any other interpretation of the scope of the consent would place an oppressive burden on the police when conducting consent searches, since they would never know what is within the scope and what is not.

ARGUMENT

Introduction

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is equally settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The constitutional question in the present case concerns the scope of a general and unqualified consent.

The Supreme Court of Florida upheld the trial court's suppression of the cocaine found in Respondents' motor vehicle, finding that consent to search the motor vehicle for narcotics did not extend to the closed container found in the vehicle. (Pet. App. 1a). The court relied on its prior decision of *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* 495 U.S. ___, 110 S.Ct. ___, 109 L.Ed.2d 1 (1990), where, based on a consent to look in a car trunk, the court held that an ill defined or limited consent did not vest the police with all the authority conferred by a warrant. (Pet. App. 11a). The court then applied the foregoing holding and found that Respondents' consent to search their motor vehicle for narcotics did not extend to a closed container found within the passenger compartment of the vehicle. (Pet. App. 1a).

The issue before the Court is whether a general and unqualified consent to search a particular area for a definite object, extends to all containers within the permitted area which might reasonably contain the object of the search.

When such a consent is given, it is not in the abstract. Rather, the consenting party is permitting a search of his protected zone for a distinct object. The scope of the search then, based on the objective facts, extends to all areas or containers where it would be reasonable to look for the object of the search. This standard, just as in warrant or probable cause searches, will ensure that the government agent's conduct will be subject to detached, neutral, judicial scrutiny for an evaluation of the reasonableness of the search in light of the objective facts.

I. THE SCOPE OF A CONSENT SEARCH EXTENDS TO ALL AREAS, INCLUDING CLOSED CONTAINERS, WHICH COULD REASONABLY CONCEAL THE OBJECT OF THE SEARCH, WHEN THE CONSENTING INDIVIDUAL IS ADVISED AS TO THE NATURE OF THE INVESTIGATION AND THE OBJECT OF THE SEARCH.

A. The Fourth Amendment requires that the scope of a search, whether authorized by warrant, probable cause or consent, be reasonable when viewed by the objective facts which surround the encounter.

The Respondents were told by Officer Trujillo that he wished to search the vehicle because he was looking for illegal drugs. The Respondents' consented. The Florida Supreme Court held that the consent to search their motor vehicle for narcotics did not extend to closed containers found within the passenger compartment. Florida submits that the Respondents' consent did not authorize a search in the abstract. Rather, the Respondents authorized a search for illegal drugs.

The determination if the search or seizure is reasonable is a two prong inquiry. *Terry v. Ohio,* 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Since the valid consent[1] lawfully placed Officer Trujillo in the passenger compartment of the car, to search for illegal drugs, his search of the rolled up brown paper bag placed on the floor of the car was reasonably related in scope to the consent search. These parameters are as reasonable as the scope of a warrant or probable cause search under similar circumstances. The valid consent is no different than probable cause, inasmuch as both lawfully place the police in a protected area. Informing the individual of the area and object of the search serves as the particularity requirement of the warrant, inasmuch as both specifically describe the place, persons or things to be searched or seized.

The Florida Supreme Court's approach takes the abstract position by which consent to search a vehicle for illegal drugs extends to the vehicle alone. Any containers uncovered by the search are not within the scope of the consent. This is contrary to this Court's Fourth Amendment analysis.

The Fourth Amendment's Warrant Clause prohibits the issuance of any warrant, except one "particularly describing the place to be searched and the persons or things to be seized." The particularity requirement was incorporated to prevent general searches. A general search can not occur when the authorization is limited to specific areas and things for which there is probable cause to search. *Maryland v. Garrison,* 480 U.S. 79, 80, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). The Fourth Amendment assures, not that the citi-

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1 The first prong of the inquiry, whether the officer's action was justified at its inception, is not at issue. However, a voluntary consent lawfully places the police in the area, and gives the police no broader or narrower rights within the area than that permissible in a warrant or probable cause search.

zens are free from all searches, but only that no search will occur that is unreasonable. *Illinois v. Rodriguez,* 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 148 (1990). In determining if the seizure and search were unreasonable, the inquiry is twofold: first, was the officer's action justified at its inception; and second, was the search reasonably related in scope to the circumstances which initially justified the interference.[2] *Terry v. Ohio, supra* 392 U.S. at 20-21. In reviewing all Fourth Amendment intrusions, the scope of the particular intrusion, in light of all the exigencies of the case, is the central element in the analysis of reasonableness. *Id.* 392 U.S. at 18 n.14. The determination must be made, based on the objective factors, that the scope of the search was strictly tied to and justified by the circumstances which rendered its initiation permissible. *Id.* 392 U.S. at 19. If the scope of the search exceeds that permitted by the terms of a valid warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is, without more, unconstitutional. *Horton v. California,* 495 U.S. ___, 110 S.Ct. ___, 110 L.Ed.2d 112, 125 (1990).

The foregoing are the established principles for determining the scope of a search under warrant. As the Court has noted in *Ross:*

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

United States v. Ross, 456 U.S. 798, 820-824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). (Footnotes omitted).

This Court in *Ross,* also established that the scope of a warrantless search based on probable cause is exactly the same as that of a search authorized by warrant. *Id.* 456 U.S. at 823.

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawn mower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed

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2 Since the voluntariness of the consent is not at issue herein, only the second prong of the inquiry will be dealt with.

> in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

Id. 456 U.S. at 824.

To be valid under the Fourth Amendment, the scope of the search must be limited by the terms of its authorization. A search by warrant is limited to places and objects, where the specifically described evidence might be found. A warrantless search pursuant to probable cause also extends to all areas or objects, where there is probable cause to believe the object of the search might reasonably be found. Florida submits that the same principles that apply to all other probable cause Fourth Amendment searches, should apply to consent searches, to wit: the scope of the search is defined by the terms of its authorization, which in turn is to be determined by the reasonableness of the search in light of the objective facts.

As the Court has noted, "[t]he actual conduct of the [consent] search may be precisely the same as if the police had obtained a warrant." *Schneckloth v. Bustamonte,* 412 U.S. 218, 243, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As stated in another context:

> When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment," *Payton v. New York,* 445 U.S. 573, 583, 63 L.Ed.2d 639, 100 S.Ct. 1371, that

> Amendment requires that the scope of every authorized search be particularly described.

Walter v. United States, 447 U.S. 649, 656-657, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). (Footnotes omitted).

In *Schneckloth* and *Walter*, this Court has implicitly found that the scope of a consent search is defined by the terms of its authorization; what remains undecided is how to interpret the authorization. Florida submits that the terms of a consent search authorization should be determined by what a police officer could reasonably interpret the consent to encompass. This rule of law would permit the necessary, neutral, judicial scrutiny of the objective facts.

> . . . The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate.

Terry v. Ohio, supra, 392 U.S. at 21-22, (Footnote omited). *See also Scott v. United States,* 436 U.S. 128, 137, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

Under this standard, the objective facts used to determine the limits of the authorization would be dependent upon what the individual was told of the nature of the search. The police officer, by telling the individual the area he wished to search and the object he was looking for, has defined the

required particularity necessary to avoid a general search. The reasonableness of the search can then be determined if the area that was searched could have contained the object of the search. The search could, especially if consent is given to search for narcotics, reasonably extend to closed containers, locked or unlocked. This is reasonable since, "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States v. Ross, supra* 456 U.S. at 820.

The Supreme Court of Florida has held that the consent to search the motor vehicle for narcotics extends only to a visual viewing of the passenger compartment and not to the actual contents located therein. In effect, the court has turned the search of the vehicle for narcotics into a game of "Mother may I," in which the police would have to ask for new permission to search each item that could reasonably contain the illegal drugs. This imposes an unrealistic restriction on a police officer's ability to make a search that is reasonably targeted, within the confines of his authority — here, consent to search the car — to uncover the object of the search, illegal drugs.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida Courts for further proceedings.

Respectfully submitted,

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FOR ARGUMENT

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No. 90-622

in the Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

DOES THE SCOPE OF A SEARCH OF A MOTOR VEHICLE AUTHORIZED SOLELY BY CONSENT TO SEARCH FOR NARCOTICS EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 564 So.2d 1083 (Fla. 1990). (Pet. App. 1a-3a).

The opinion of the District Court of Appeal of Florida, Third District, is reported at 550 So.2d 1176 (Fla. 3rd D.C.A., 1989). (Pet. App. 4a-6a).

The trial court's order granting motion of Respondents, Luz Piedad Jimeno and Enio Jimeno, to suppress evidence is not reported. (Pet. App. 7a-11a).

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, were the Respondents in the Supreme Court of Florida. The facts of the case, as set forth in the trial court's order granting the Motion To Suppress, are as follows:

> On March 2, 1989, the Court heard the defendants' Motion To Suppress. None of the three defendants were present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings.
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

> 3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.
>
> 4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife Luz, who was present when the search was conducted, did not object to the search.
>
> 5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.
>
> 6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, i[n] (sic) fact, the officer never requested permission to open the bag and examine the contents. (Pet. App. A-5, A-6; A-7).

As explained in Respondents' Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of Florida, in compliance with Rule 15.1 of the Supreme Court Rules, the trial court also held that the search of Respondents' motor vehicle was not authorized by probabie cause and was solely legally permissible based upon the consent given.

The trial court in reliance on *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd. on other grounds* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), held that the scope of the consent given did not extend to the search and seizure of the

bag. The trial court then granted the Motion To Suppress of Luz Piedad Jimeno and Enio Jimeno. (Pet. App. A-1).

The State appealed this decision to the District Court of Appeal of Florida, Third District. That court affirmed the trial court's suppression of the evidence. The court held that a consent to a search of an area for narcotics does not extend the scope of the consent to a sealed container located within the general area consented to. The Third District certified to the Supreme Court of Florida, the question of whether the scope of consent extends to a closed container after consent has been given to search a motor vehicle for narcotics. (Pet. App. A-4).

The Supreme Court of Florida accepted the State's petition for discretionary review based on the certified question. That court approved the decision of the district court and concluded that consent to search the motor vehicle does not extend to a closed container found inside the vehicle. The Supreme Court of Florida relied on its holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989) *aff'd. on other grounds,* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). (Pet. App. A-8-A-23).

In *Wells*, the Supreme Court of Florida held that a general consent to open and look into the trunk of an automobile, without informing the occupant of what the police were looking for, was insufficient to authorize the opening of any locked or closed container found in the trunk. The court rejected the State's argument that, pursuant to *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), where there was probable cause to search, the scope of a consent search extends to every part of the vehicle and its contents that may conceal the object of the search.

SUMMARY OF ARGUMENT

Consent to search a motor vehicle does not extend to consent to search a closed paper bag found inside of a vehicle even using the objective standard enunciated in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The consent that Officer Trujillo received to search the motor vehicle did not include consent to search the closed bag.

When law enforcement officers are relying upon consent to conduct a warrantless search their search is limited by the scope of the consent given. *State of Florida v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). Because Officer Trujillo only received consent to search the motor vehicle and not the closed bag, the search of the bag was improper. This is totally reasonable because the consent to search for drugs was not in the abstract. The consent was to search the motor vehicle, not consent to search a closed bag. Asking the correct question would not have placed an oppressive burden on Officer Trujillo. Officer Trujillo, after observing and following Respondents for hours, knew that as a law enforcement officer he was only interested in the paper bag. Therefore, as a law enforcement officer it would have been easier to ask the correct question. Officer Trujillo probably did not ask for consent to search the paper bag because the officer feared that Respondents might have said no.

ARGUMENT

INTRODUCTION

Where there is no probable cause to search, and the state is relying upon consent to justify the search, then the police should have no more authority to search than that reasonably conferred by the terms of the consent.

The Supreme Court of Florida in upholding the trial court's suppression of the cocaine found in respondents' motor vehicle, found that the consent to search the motor vehicle for narcotics did not extend to the closed container found in the vehicle. (Pet. App. A-1)

Certainly law enforcement officers may search a closed bag if given permission to search the closed bag. Such verities as exceptions to the search warrant requirement do not apply when a law enforcement officer is given consent to conduct a warrantless search. In giving consent to search his motor vehicle, Respondents did not give consent to search a paper bag found on the floor of the vehicle. The consent to search applied only to the general open area of the automobile. In fact, the police officers did not obtain consent to search any closed compartments or containers. Assuredly, the same lack of consent for closed containers would have even applied to a closed briefcase in the trunk of a vehicle.

I. THE SCOPE OF A SEARCH OF A MOTOR VEHICLE AUTHORIZED SOLELY BY CONSENT TO SEARCH FOR NARCOTICS DOES NOT EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

After stopping their automobile, Officer Trujillo informed the Respondents that he wished to search the vehicle. What is curious about this, is that Officer Trujillo knew that he really was not interested in searching the vehicle but was interested in searching the closed paper bag which he had earlier seen Respondents' put in the vehicle. Officer Trujillo admitted this on direct examination by the

State at the Motion To Suppress before the trial court when he stated at page 24 of that Motion:

> Q. Now, what happened after you obtained consent to search the vehicle; what happened next?
>
> A. Okay. I knew what I was going to look for. I was looking to see what was in the package we had seen coming down—I immediately went down to the passenger side, opened the door to—the passenger door, and I looked on the floor board. There was a brown grocery bag.

Officer Trujillo clearly knew that he was not interested in searching the vehicle but simply in searching the brown grocery bag. He had been following the Respondents and their vehicle for hours and knew that the object of his interest and his investigation was not the vehicle but the closed container. Notwithstanding Officer Trujillo's target of his interest and investigation, Officer Trujillo asked the Respondents for consent to search the vehicle and not the closed bag.

Officer Trujillo's request to search the vehicle was asked plainly and clearly. If Officer Trujillo was only interested in searching the package he had seen, as he admitted in direct examination, then the officer should have asked for consent to search the closed bag. The proper question should have been, may I search the closed bag and not may I search your vehicle, I am looking for narcotics. In fact, Officer Trujillo's question would have been a shorter and more succint one.

It appears that the law enforcement officer intentionally did not ask for consent to search the paper bag. He could have simply walked up to the Respondents and asked "what's in the paper bag" or asked for permission to search

the bag. Officer Trujillo asked the question which resulted in the answer he wanted.

Let us assume that Respondents knew there was cocaine only in the closed bag. If Respondents knew there was cocaine only in the closed bag and not in the rest of the vehicle then it is logical to assume that Respondents would have easily given their consent to search the vehicle. Concomitantly, it is also logical to assume Respondents would not have given their consent to search the closed bag.

In this cause, the evidence is undisputed that the officer sought permission to only search the vehicle. The failure of Officer Trujillo to obtain specific consent to search the bag is fatal to the State's cause. In *State of Florida v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd on the grounds*, ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), the Florida Supreme Court differentiated between the scope of a consensual search and that of a search based upon probable cause.

In *Wells*, 539 So.2nd at 467 the Supreme Court of Florida reasoned that the principles that applied to probable cause searches are totally incongruous to the freedom of choice inherent in consensual searches. The court stated,

> . . . [a] consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said 'you can look in my car but not in my trunk.'

The *Wells* court explained this further at 467 when it stated,

> [w]hen the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis.

So too, Officer Trujillo had no other basis to search the closed bag. He was given consent merely to search the vehicle but not to search sealed or locked containers within the vehicle.

Petitioner can find no solace in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.Ed.2d 572 (1982) defining the scope of searches conducted based upon probable cause. Officer Trujillo concluded and the trial court agreed that Officer Trujillo had no probable cause to search the closed bag. Officer Trujillo admitted his lack of probable cause during his examination at the Motion To Suppress before the trial court at page 44 when the following colloquy took place:

> The court: . . . Let me ask you something. What good would it have done you to get a search warrant?
>
> The Witness: I didn't think I had enough probable cause to—.

The trial court stated in its Order,

> [s]ince there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, . . .

The Court in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) did not intend to apply its decision to the scope of a search made without probable cause. The *Ross* Court expressly limited itself to cases where there was probable cause to justify the search. *Ross* 456 U.S. at 800, 809, 825. The *Ross* Court stated at 456 U.S. 800,

> [i]n this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.

The *Ross* Court therefore limits itself to causes where police officers have probable cause to believe that contraband is concealed somewhere within a vehicle. In the case at bar, the trial court held and Officer Trujillo agreed that there was no probable cause for the search of Respondents' vehicle.

The Petitioner's argument can further find no further comfort in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Terry* the court found the conduct of a police officer proper where the officer patted down the outer clothing of 3 individuals whom the officer suspected were going to do something illegal based on his more than 30 years of law enforcement experience. The law enforcement officer in *Terry*,

> confined his search strictly to what was minimally necessary to learn whether the men were armed and

> to disarm them once he discovered the weapons. *Id.* 392 U.S. at 30.

Respondents' consent to search only his vehicle is factually distinct from the issues in *Terry*. Notwithstanding the factual dissimilarity of *Terry*, the objective standard enunciated in *Terry* is favorable to the Respondents. A request for consent to search should be as specific as it reasonably and objectively can be. A lack of specificity will result in an inordinate potential for great abuse. Officer Trujillo knew in advance precisely what he was interested in. He deliberately looked in the closed bag when he knew that asking the right question would have probably resulted in his not being given consent.

A consent to search a vehicle should ordinarily be construed to permit law enforcement officers to search the vehicle but not search any closed containers or locked containers within the vehicle. An ordinary and prudent individual would believe that giving consent to the search of her vehicle, without probable cause, would mean that the police would not search inside locked containers, sealed bags, closed suitcases, and any other closed receptacles in which contraband might be found.

In a case such as this one, where the person giving consent is told in advance that the police are looking for drugs, it does not seem logical that an individual such as Respondents would be giving Officer Trujillo permission to search a closed bag if Respondents knew that the closed bag contained narcotics. It seems logical, that Respondents would give consent to search their vehicle and not a closed paper bag because Respondents knew that the drugs were inside the paper bag. Respondents therefore realized that consent to search the vehicle did not include consent to search the closed paper bag.

It was not difficult for Officer Trujillo to ask Respondents to search the vehicle. Certainly, it would not have been any more onerous for Officer Trujillo to ask Respondents for consent to search the closed bag. It is certainly not an unrealistic restriction on a police officer's ability to make a search to have required the officer to get consent to search the paper bag. All it would have entailed was asking the correct question.

In responding to the Brief of Petitioner on its merits we have also responded to the concerns raised by the United States as Amicus Curiae.

In this cause, the trial court, the Third District Court Of Appeals of Florida and the Florida Supreme Court have reviewed this matter based upon the facts in this case and affirmed this cause based on the *Wells* case. The Supreme Court of Florida has held that the consent to search the motor vehicle for narcotics extends only to a visual viewing of the passenger compartment and not to the actual contents located therein.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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BEST AVAILABLE COPY

No. 90-622

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF FLORIDA,

Petitioner,

v.

LUZ PIEDAD JIMENO and ENIO JIMENO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

EMERGENCY MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS OUT OF TIME

The National Association of Criminal Defense Lawyers ("NACDL"), by and through counsel, President-

Elect Jeffrey S. Weiner and Weiner, Robbins, Tunkey, Ross, Amsel & Raben, P.A., pursuant to Supreme Court Rule 21.1, moves this Court for leave to file an *amicus curiae* brief in support of the Respondents out of time. As grounds therefor, NACDL states as follows:

1. NACDL is a national bar organization with membership exceeding 25,000 lawyers focused exclusively on criminal law matters. It is dedicated to the protection of the Bill of Rights. Its *Amicus Curiae* Committee regularly files briefs in this Court, as well as the federal circuit and district courts and state appellate and trial courts.

2. The captioned case raises a crucial issue: whether police violate the fourth amendment when, though their suspicion has focused on a closed container located in a suspect's automobile, they fail to request permission to search the container and instead request, and only obtained, consent to search the automobile. This issue is of great importance not only because of the

practical impact it will have on the integrity of investigative police procedures nationwide, but also because of the important jurisprudential issues that must be addressed to resolve the case. The case promises to bring a landmark decision.

3. Oral argument is set on March 25, 1991.

4. Despite NACDL's efforts to monitor all petitions for writs of certiorari concerning criminal related matters which come before this Court, the instant case escaped our attention. NACDL first took notice of the case approximately two weeks ago when counsel for the Respondents (who shares an office in the same building as undersigned counsel) contacted undersigned counsel and requested the input, assistance, and participation in oral argument of NACDL. Undersigned counsel immediately contacted the Clerk of this Court to determine whether there was any emergency vehicle to surmount the apparent bar of Supreme Court Rule 37.3 and simultaneously marshalled resources to begin

researching the important issue before this Court.

5. NACDL submits that it has important legal and policy arguments to offer that have not been made by the Respondents which must be considered by the Court to arrive at a legally correct decision. *See* S.Ct. R. 37.1.

6. The Respondents have specifically requested NACDL to file a brief in support of them. NACDL has contacted counsel for the Petitioner who states that he has no objection to their participation. The United States has filed an amicus curiae brief in support of the Petitioner and will be participating in oral argument.

7. Undersigned counsel has been a member in good standing of this Court's Bar since 1978.

8. NACDL has contemporaneously filed its brief in support of Respondents and emergency motion for leave to participate in oral argument.

WHEREFORE, the NACDL respectfully prays

that this court accept their contemporaneously filed *Amicus Curiae* brief in support of Respondents and consider the arguments a they bear on the merits of this case.

Respectfully submitted,

BY: _____

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QUESTION PRESENTED

Whether the police violated the fourth amendment when, though their suspicion had focused on a closed paper bag which had been placed in the Respondents' automobile, they failed to request permission to search the bag and instead requested and only received consent to search the automobile.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, The National Association of Criminal Defense Lawyers, is a national bar organization with membership exceeding 25,000 lawyers dedicated exclusively to criminal law matters. Its members practice in virtually every state and federal court in this country. They meticulously study and analyze police procedure on a daily basis. The organization is dedicated to the protection and preservation of the Bill of Rights. It is most concerned with any judicial decision that might diminish the protections of the fourth amendment.

The position taken by the State of Florida and *Amicus Curiae* the United States threatens to carve away another substantial piece of the fourth amendment and to significantly diminish the privacy and security rights of the people against our government. It will lead to an increase in the type of deception and abuse intended to be prevented by that amendment. It will increase the

incidents of searches and seizures conducted without warrant, probable cause, or actual authority to conduct the search thus wholly circumventing the fourth amendment. It will dramatically change police investigative procedures. For these reasons, *Amicus Curiae* is committed to intervening on behalf of the Respondents and fourth amendment and to provide its assistance in resolving this important matter.

STATEMENT OF THE FACTS

Amicus deems the following facts to be particularly crucial to this Court's resolution of the issue presented:

1. The object of officer Trejillo's suspicion was the brown paper bag he ultimately searched. After his suspicion arose that the Respondents were involved in a drug transaction, he observed them remove the paper bag from their vehicle, bring it into the apartment

minutes later after he suspected the drug transaction had been concluded. Pet. App. A.6.; Suppression HEaring Tr.20-21.

2. Officer Trejillo never asked the defendants if he could search the brown paper bag.

3. Although defendant Jimeno had been advised by officer Trejillo that he believed Jimeno was carrying narcotics, upon acceding to the officer's request to search the vehicle, Jimeno indicated he was not vulnerable to the search he had authorized by indicating he had nothing to hide. Pet. App. A.6.; Suppression Hearing Tr. 23-24.

4. Upon receiving Jimeno's consent, Officer Trejillo went immediately to the location where he believed the brown paper bag would be, seized it, and opened it. Pet. App. A.6.; Suppression Hearing Tr. 24, 26-28, 37, 48-49.

SUMMARY OF THE ARGUMENT

The question of whether the police search of a particular area or item exceeds the scope of a defendant's consent is no different from the question of whether the defendant voluntarily consented to a search of the targeted area or item. Framed in this way, it is obvious that in order to establish valid consent, the prosecution bears the burden of proving that the defendant, in fact, voluntarily consented to the search. In other words, the proper scope of the search is determined by the subjective intent of the consenter.

The Petitioner's suggestion that this court should adopt an objective, "reasonableness" test, transforming the inquiry to "what an objective viewer, knowing all the facts, would have understood the scope of the consent granted to have been," must be rejected. The inquiry this

Court has always prescribed in determining the validity of a consent search has focused on whether the particular consenter has, in fact, given voluntary consent. All of the factors used to conduct this appropriate inquiry focus on the subjective state of mind of the consenter. Moreover, a test based on the consenter's subjective intent is necessary to insure that police do not supersede the only authority they have to search.

This Court's decision in ***Illinois v.Rodriguez***, __ U.S. __, 110 S.Ct. 2793 (1990), does not support application of an objective "reasonableness" test. There, it was unquestionable that police had obtained voluntary consent, in fact; the only issue was whether the third-party had authority to consent. This Court was not concerened that deceit or subtle coercion may have visciated the third-party's consent. Additionally, the objective "reasonableness" test was adopted in recognition that it was unfair to burden police officers

with making especially difficult judgment calls as whether the party has authority to consent. By contrast, in the instant case, where the officer eliciting consent failed to advise the Respondents of the true object of his suspicion, this Court must be concerned that this deception resulted in Respondent Enio Jimeno uttering the words that the officer claimed authorized his search of the bag. Additionally, unlike the issue in ***Rodriguez***, there is no need for the officer to exercise any judgment - all doubt can be eliminated by simply asking the suspect if he specifically consents to a search of the area of object of the officer's suspicion.

Moreoer, an officer should obtain specific authorization to search a specific object or area of suspicion to prevent a possibility of official coercion, deception, or other abuses resulting in searches unauthorized by the subject. Requiring an officer to clarify the scope of the individual's consent would

prevent or at least minimize the element of coercion inherent in any confrontation between the police and a citizen. Such a requirement would also simplify the administrative burden on the courts in resolving motions to suppress based purportedly upon consent and would insure the accuracy of those determinations. Such a rule would provide a quick and simple answer for law enforcement officers involved in otherwise quickly developing investigations and would remove all guess work on the part of the officer regarding what may and what may not be searched.

Finally, any distinction in the permissible scope of a consent search based on the nature of the container encountered will deny equal protection and result in an in an impermissible discriminatory application of the fourth amendment. Such a distinction would promote and ingidious distinction between rich and poor which is repugnant to our Constitution.

ARGUMENT

THE POLICE VIOLATED THE FOURTH AMENDMENT WHEN, THOUGH THEIR SUSPICION HAD FOCUSED ON A CLOSED PAPER BAG LOCATED IN THE RESPONDENTS' AUTOMOBILE, THEY FAILED TO REQUEST PERMISSION TO SEARCH THE BAG AND INSTEAD REQUESTED AND ONLY OBTAINED CONSENT TO SEARCH THE AUTOMOBILE.

A. WHERE THE PROSECUTION RELIES UPON CONSENT TO JUSTIFY A SEARCH, IT MUST PROVE THAT THE SUBJECT, IN FACT, CONSENTED VOLUNTARILY NOT MERELY THAT A HYPOTHETICALLY OBJECTIVE POLICE OFFICER WOULD HAVE REASONABLY BELIEVED THAT A VOLUNTARY CONSENT HAD BEEN CONVEYED.

Although a consent search "is a constitutionally permissible and wholly legitimate aspect of effective police activity," ***Schneckloth v. Bustamonte***, 412 U.S. 218, 228 (1973), it is nonetheless an exception to the fourth amendment's warrant requirement and is presumptively

unreasonable. *See* ***Skinner v. Railway Labor Executives Ass'n.,*** 489 U.S. 602 (1989); ***Katz v. United States***, 389 U.S. 347, 357 (1967). The fourth amendment's strong preference for warrants "is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its purpose and scope." ***Skinner***, 109 S.Ct. at 1415.

Recognizing the grave danger of police coercion and abuse inherent in securing consent, this Court has warned that consent searches cannot be approved without the most careful scrutiny. ***Schneckloth*** at 229. Thus, unlike where police have secured a warrant, the prosecution bears the burden of proving consent. It must do so by at least a preponderance of the evidence.[1] It

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[1] Several federal circuit courts require clear and convincing evidence to establish consent or apply other stricter standards. *See, e.g.,* ***United States v. Corral,*** 899

must prove any consent was given freely and voluntarily. *E.g.*, ***United States v. Mendenhall***, 446 U.S. 544, 557-60 (1980); ***Schneckloth*** at 241. The existence of consent is not lightly to be inferred; indeed courts indulge every reasonable presumption against waiver of such fundamental constitutional rights. *E.g.*, ***United States v. Shaibu***, 895 F.2d 1291, 1293-94 (9th Cir. 1990); ***United States v. Benitez***, 899 F.2d 995, 998 (10th Cir. 1990).[2] Most

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F.2d 991, 994 (10th Cir. 1990); ***United States v. Shaibu***, 895 F.2d 1291, 1293-94 (9th Cir. 1990); ***United States v. Jones***, 846 F.2d 358, 360 (6th Cir. 1988). ***But see United States v. Hurtado***, 905 F.2d 74 (5th Cir. 1990)(*en banc*)(overruling long standing line of cases requiring consent to be proven by clear and convincing evidence in favor of preponderance standard).

[2] The Court in ***Schneckloth***, the Court, distinguished the waiver of fourth amendment rights from the waiver of trial rights and stated that every reasonable presumption need not be indulged against voluntary relinquishment. *Id*. at 243. This distinction begs the question of whether the relinquishment is, in fact, voluntary. Certainly the community's interest in aiding the discovery of evidence and apprehension of criminals does not go so far as to condone the extraction of unintended, involuntary consents. The lower courts' use of a presumption against the waiver of fourth amendment rights is an effective legal tool to assure the voluntariness of consents.

significantly, the existence of voluntary consent has always turned on a determination of whether permission to search was in fact given, and given voluntarily, not upon some abstract assessment of whether a hypothetically objective police officer would have reasonably believed that a voluntary consent had been conveyed. *E.g.*, ***Mendenhall*** at 544; ***Schneckloth*** at 222, 230 ("[t]he very object of the inquiry [is] the nature of a person's subjective understanding . . ."), 233; ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968); ***United States v. Leary***, 846 F.2d 592, 599 (10th Cir. 1988)(consent to search must be voluntary in fact).

The factors courts examine in determining the validity of consent have been carefully selected, *inter alia,* for their ability to ferret out whether voluntary consent has been, in fact, given. These factors include the consenter's age, education, and intelligence level,[3] the

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[3] ***Scheneckloth*** at 226; *see* ***Mendenhall*** at 558.

"possibly vulnerable subjective state of the person who consents,"[4] and the consenter's belief that no incriminating evidence will be found.[5] This analysis stands in sharp contrast to the analysis prescribed for testing whether a person has been "seized" for fourth amendment purposes which is designed to determine whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Michigan v. Chesternut,*** 486 U.S. 567, 573 (1988)(*quoting* ***Mendenhall*** at 554).[6]

The historical requirement of voluntary consent, in

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[4] ***Schneckloth*** at 229.

[5] ***United States v. Gonzalez-Basulto***, 888 F.2d 1011, 1013 (5th Cir. 1990); ***United States v. Blake***, 888 F.2d 795, 798 (11th Cir. 1989); ***United States v. Crespo***, 834 F.2d 267, 272 (2d Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988).

[6] This court is examining the application of this test this Term in ***Florida v. Bostick***, No. 89-1717 (argued February 26, 1991), and ***California v. Hodari, D.,*** No. 89-1632 (argued Jan. 14, 1991).

fact, is based upon the significant distinction between searches conducted pursuant to warrants and other probable cause related exceptions to the warrant requirement, and searches conducted pursuant to consent. When a law enforcement officer searches pursuant to a warrant or a probable cause related exception, "the situation is instinct with coercion . . .." *Bumper*, 391 U.S. at 550. The authority to search arises from circumstances over which the target has no control; the target is compelled to acquiesce in the search. On the other hand, consent searches arise from situations, at least in theory, antithetical of coercion. They are permitted only to the extent that the target is willing to freely and voluntarily waive the protection otherwise provided by the fourth amendment. They are strictly limited by the subjective intent of the consenting person. Any search beyond that subjectively intended by the consenter, by reason of misunderstanding or otherwise,

is one wholly lacking in authority and constitutional justification.

The question of whether the scope of a search conducted pursuant to consent extends to a particular area or item is, more accurately stated, whether the subject gave voluntary consent, in fact, to search the targeted area or item. Because the authority for these searches derives exclusively from the suspect's waiver of fourth amendment rights, their polestar, as with all other issues concerning the existence of consent, is the subjective intent of the consenter. Thus, as this Court stated in ***Schneckloth***, the search of the targeted area or item is only justified if the suspect, in fact, gave voluntary consent.

Stated still another way, the relevant question is whether the person impliedly consented to the search of the targeted area or item. In this context, as well, courts uniformly inquire whether the person, in fact, intended

by words or conduct to consent to a search of the area or item in question. *See* ***United States v. Most***, 876 F.2d 191, 199 (D.C. Cir. 1989); ***United States v. Leary***, 846 F.2d 592, 599 (10th Cir. 1988). The courts do not inquire as to whether a "reasonable" person would have inferred consent from the individual's conduct or statements. Instead, the question is and must be, whether the person, in fact, gave a voluntary consent.[7]

The United States, and to a lesser extent the Petitioner, rely on this Court's decision in ***Illinois v. Rodriguez***, __ U.S. ___ 110 S.Ct. 2793 (1990) for the proposition that the relevant inquiry in determining the existence of consent is "what an objective viewer, knowing all the facts, would understand to be the scope of the consent granted," and not whether "an individual

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[7] The Petitioner's postulation that "the voluntariness of the consent is not at issue," Brief at 12 n.2, is unsupported and legally erroneous. The analysis above demonstrates that voluntariness is precisely the issue to be determined.

subjectively intends to consent to only a limited search." Brief of the United States at 10. As is stated *supra*, this proposed rule contradicts the long standing rule developed in cases like ***Bumper*** and ***Schneckloth***, that the existence of consent must be determined with reference to the purportedly consenting party's subjective intent. Moreover, such a rule would extend unnecessarily and improvidently beyond the pale of ***Rodriguez***.

In ***Rodriguez***, this Court was confronted with the question of whether the validity of third-party consent turns on the existence *vel non* of the third-party's authority or a determination of whether "the facts available to the officer at the moment . . . "warrant[ed] a man of reasonable caution in the belief" that the consenting party had authority over the premises." *Id.* at 2801. In adopting the latter rule, this Court reviewed several fourth amendment scenarios in which the objective "reasonableness" requirement applies and

determined there was "no reason to depart from this general rule with respect to facts bearing upon the authority to consent to search." *Id.* at 2800 (emphasis added). The Court further explained, "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Id.*

Clearly, the rule of ***Rodriguez*** does not extend to the instant case. In ***Rodriguez***, there was no question that the third party, in fact, voluntarily consented to the police officers searching the defendant's apartment. The officers acted on her express, subjective intent to authorize their search. The Court adopted the objective reasonableness approach only to the question of whether the third-party had authority to consent.

In the instant case, there is no question but that Respondent Enio Jimeno had authority to consent to the search of the car he was driving. The question raised is

whether the scope of the search conducted comported with the scope of the search authorized. In other words, this Court must determine whether the Respondent, in fact, consented to a search of the paper bag and did so freely and voluntarily. The case of ***Rodriguez*** does not even purport to apply an objective reasonableness test to this issue.

The reasoning of ***Rodriguez*** also fails to extend to the instant case. In applying the "reasonableness" test to the question of whether one has authority to consent, this Court appeared to indicate it was primarily concerned with the difficulty police officers encounter in applying their judgment to complex and quickly unfolding factual scenarios to determine the extent of their authority in conducting criminal investigations. *See id.*, 110 S.Ct. at 2800. In determining the scope of consent, there is no call for the application of a law enforcement officer's judgment. The officer is not attempting to carry out the

will of a magistrate who is not present and is unable to clarify the details of a scenario possibly not contemplated by the magistrate at the time of the search. *See id.* at 2799. The officer is not being required to react to a quickly developing situation involving the arrest of a felon where the officer's safety is on the line. *See id.* at 2799-2800. The officer is not being required to make a complicated determination of whether a particular individual has sufficient rights and interest regarding a particular place to authorize that person to consent to a search. *See id.* Instead, we are concerned with a situation where the polestar for the officer's search, the individual consenting to the search, is present and able to quickly and easily clarify any doubts about the nature and scope of the officer's authority to search. This is a type of search for which neither the constitution nor practicalities relegate police officers to act upon probabilities; absolute certainty can and must govern the

nature and scope of the officer's conduct.

Relaxing the prosecution's burden in justifying consent searches from establishing voluntary consent in fact to merely establishing that a reasonably objective officer would have understood consent to have been granted would fully unanchor this doctrine from its analytical mooring - scrupulously adhering to the free will of the consenter. For without the free and voluntary will of the consenter, absent warrant or circumstances establishing any other exception to the warrant requirement, the police officer has no justification, whatsoever, to invade the consenting party's well-recognized, reasonable expectation of privacy. The authority to consent would be taken from the person whose rights are being violated and placed in the hands of a hypothetically objective police officer whose perception of the authority granted may differ substantially from the intent of the person conveying

authority. This the fourth amendment prohibits.

There is nothing inconsistent with resorting to a "reasonableness" test in determining a third-party's authority to consent to a search, ***Rodriguez***, and holding fast to a requirement of voluntary consent <u>in fact</u> when determining the existence of consent to search a particular area or item. In ***Schneckloth***, the Court relied upon the voluntariness test of its confession cases to establish an analytical framework for determining the voluntariness of consent. It acknowledged that the basis for this voluntariness test is found, at least in part, in "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair . . . police tactics poses a real and serious threat to civilized notions of justice." *Id.*, 412 U.S. at 225.

Where police rely upon third party consent to justify a search, there is no question concerning

deceptive, coercive, or other unfair tactics. The third-party has, in fact, given consent and given it voluntarily. Nothing the police can do can provide the third-party with more authority to justify the search. This is the same where police search pursuant to a warrant or probable cause in conjunction with exigent circumstances. Hence, we forego nothing in deterring police deception and abuse by resorting to a "reasonableness" test.

On the other hand, when the question involved concerns whether, in fact, a person has voluntarily consented, police have tremendous incentive to employ deception, coercion, or other abuses to increase their chances of securing consent. Clearly, police employment of these tactics violates the Constitution's notion of fundamental fairness. Thus, it is not inconsistent with resorting to an objective "reasonableness" when determining the authority of a third-party to consent, while maintaining closer scrutiny of police conduct by

examining the target's subjective intent when determining the existence and voluntariness of consent. *See* W. LaFave, *Search and Seizure,* § 8.1(b) at 159-60 (2d ed. 1987).

B. AN OFFICER MUST OBTAIN SPECIFIC AUTHORIZATION TO SEARCH THE SPECIFIC OBJECT OR AREA OF SUSPICION TO PREVENT COERCION, DECEPTION, AND OTHER ABUSES RESULTING IN SEARCHES UNAUTHORIZED BY THE SUBJECT.

In determining the existencce of voluntary consent, the courts' central concern is that the consenter's free will must not be overborne by "duress or coercion, express or implied". ***United States v. Mendenhall***, 446 U.S. 544, 557 (1980). Courts must take account of "subtle coercive police questions." ***Schneckloth*** at 229. "Acquiescence to a claim of lawful authority" does not constitute consent. ***Bumper v. North Carolina***, 391 U.S.

constitute consent. ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968). Deceit, trickery, and misrepresentation are certainly within the pale of coercion. ***See United States v. Briley,*** 726 F.2d 1301, 1304 (8th Cir. 1984); ***United States v. Turpin***, 707 F.2d 332, 334-35 (8th Cir. 1983); ***United States v. Twell***, 550 F.2d 297, 299 (5th Cir. 1977); ***United States v. Alexander***, 390 F.2d 101, 109-10 (5th Cir. 1968). "Where there is coercion there can be no consent." ***Bumper*** at 550. Accordingly, the primary purpose of the factor's examined to deetermine the voluntariness of consent is to uncover the existence of any coercion that might vitiate consent. For instance, though not outcome determinative, a suspect's knowledge of the right to refuse consent is especially significant. ***Mendenhall*** at 558-59; *see* ***United States v. Jones***, 846 F.2d 358, 360-61 (6th Cir. 1988); ***United States v. Cherry***, 794 F.2d 201, 206 (5th Cir. 1986), *cert. denied,* 479 U.S. 1056 (1987). Other

factors also reflecting this Court's concern with the danger of police abuse include the length of detention and nature of the questioning, ***Schneckloth*** at 226, and the use of physical punishment and other intrusive police behavior. *Id.; see* ***Florida v. Royer***, 460 U.S. 491, 501-07 (1983); ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975); ***Wong Sun v. United States***, 371 U.S. 471, 485-87 (1963).

In an ideal world, in the absence of a warrant, probable cause in conjunction with exigent circumstances, or one of the other well-recognized exceptions to the fourth amendment, any search conducted pursuant to a suspect's purported voluntary consent would go no further and be no more extensive than the suspect subjectively intends. This is because the sole authority and justification for such a search is that the consenting person has permitted it. It would be totally inconsistent with this exception to condone searches conducted reasonably (though erroneously) beyond the scope actually intended.

Our world is not perfect. Thus, although this Court in ***Schneckloth*** recognized the relevance and importance of a person's knowledge that consent may be withheld in evaluating whether consent was voluntary, *id.* at 229-30, it cited impracticality as the reason for not requiring proof of knowledge of the right to refuse consent as an essential prerequisite to voluntary consent. *Id.* at 231-33. However, this Court still emphasized that "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implying threat or covert force," *id.* at 228, and that "[t]o approve such searches without the most careful scrutiny would sanction the possibility of official coercion." *Id.* at 229.

In evaluating whether consent was, in fact, given voluntarily and reflects the free will of the consenter, a court must account for two factors bearing on the person's decision. First, although the type of voluntary

consent which justifies by-passing the fourth amendment's warrant requirement is supposed to be a product of the consenter's free will in an environment free of police coercion, this is an unattainable fictional goal. It is well recognized that there is always an element of coercion inherent in any confrontation between police and a citizen. *Cf.* ***United States v. Berry***, 670 F.2d 583, 596 (5th Cir. Unit B 1982)(*en banc*)(coercion inherent in all contacts between law enforcement officers and air-travellers at airport). This inherent coercion is particularly weighty when as in the instant case a police officer in some way asserts his official authority and advises the citizen that he suspects involvement in criminal activity. ***Royer***, 460 U.S. at 496; ***United States v. Galberth***, 846 F.2d 983, 990 and n.11 (5th Cir. 1988); ***United States v. Gonzalez***, 842 F.2d 748, 752 (5th Cir. 1988); *see* ***Mendenhall***, 446 U.S. at 554.

Second, a police officer seeking consent has a

tremendous incentive to employ coercion or deceit for the purpose of securing consent. Typically, consent is sought where police, acting upon a hunch, speculation, or conjecture, want to search a particular area for evidence of crime. They have no hope of establishing probable cause to secure a search warrant or of mustering the requisite circumstances necessary to invoke any other exception to the fourth amendment's warrant requirement. Absent consent, the officer will be unable to carry out the search which he subjectively believes will lead to evidence of criminality. Thus, it would be entirely natural for an officer to exploit any coercive factor inherent in a police-citizen encounter and to use any other means of subtle coercion or deception to obtain the consent that constitutes the key to furthering the criminal investigation.

Requiring an officer to clarify the scope of an individual's consent or, in other words, requiring the

officer to ascertain whether the subject, in fact, consents to a search of the specific object of suspicion would do much to prevent, or at least minimize, the coercion and deception inherent in a police-citizen confrontation. Such a requirement would assure that the search being carried out is no more extensive than the consent being given. Additionally, there is nothing impractical about making such an inquiry. It is certainly no less practical than the inquiry which generally precedes any consent search: "May I have permission to search your _____?" It does no more than to assure that there is, in fact, a voluntary consent.

The instant case exemplifies the scenario in which a person's consent is typically obtained and the role which subtle coercion and deception typically play in securing that consent. At the time the Respondents were stopped in the vehicle, they were expressly accused by a law enforcement officer of committing a traffic infraction.

Now vulnerable to the officer's decision to issue a traffic citation, the officer further advised Respondent Enio Jimeno that he was suspected of carrying narcotics in his car. With the interplay of Jimeno's vulnerability to the officer's decision regarding the traffic infraction and the accusation of a narcotics violation, the officer deceptively requested permission to search the car instead of the bag which was the true object of his suspicion.

Although the United States speculates as to the reasons why Respondent Enio Jimeno would have consented to a search of his car knowing that the brown paper bag containing the kilo of cocaine lay on the floor board on the passenger side, it fails to acknowledge the most obvious reason: the consent to search the vehicle did not extend to the closed paper bag which concealed the contraband from any one observing it from the outside. Although the officer testified he told Respondent Enjo Jimeno he could tell the officers to

stop at any point during the search, it is apparent that Respondent Enio Jimeno had little opportunity given that the officer walked directly to the part of the car where he knew the bag had been placed, seized the bag, and opened it. Thus, the officer employed subtle coercion and deception to secure consent to search the car and to prevent any objection to the search. To permit the type of search would be to condone use of the type of subtle coercion and deception employed by the officer that are the very antithesis of a voluntary consent. Requiring the officer to obtain specific authorization to search the specific object or area of suspicion would prevent this type of coercion and deception.

The United States' request that this Court implant the rule of ***United States v. Ross***, 456 U.S. 798 (1982), on the doctrine of consent to determine the scope of a general consent to search an automobile is like requesting this Court to ignore the significant distinction

between apples and oranges. Although they are both fruits, they are different in color, taste, texture, and nearly every other respect. Indeed, this court in ***Ross*** repeatedly stressed the importance of the requirement that officers have probable cause to believe the vehicle contained contraband. *Id.* at 807-09. While the automobile search of containers approved in ***Ross*** was compelled by the existence of probable cause to believe that the automobile contained contraband, in a consensual search, there is, at least in theory, no compulsion. The sole authority by which an officer proceeds in a consensual search is that, in fact, given voluntarily by the subject. If the subject does not grant consent to search a container within the vehicle, there is no compulsion or other authority by which to conduct such a search.

C. REQUIRING THE OFFICER TO OBTAIN SPECIFIC AUTHORIZATION TO SEARCH THE OBJECT OR AREA OF SUSPICION IS NECESSARY TO SIMPLIFY THE ADMINISTRATIVE BURDEN ON THE COURTS IN RESOLVING MOTIONS TO SUPPRESS BASED PURPORTEDLY UPON CONSENT AND TO INSURE THE ACCURACY OF THOSE DETERMINATIONS.

One of the most effective rules concerning police investigation conceived by this court is the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). The rule, designed to insure the voluntariness of all custodial confessions requires a police officer to advise any suspect subject to custodial interrogation of his right to remain silent and to counsel. Although the rule has unquestionably placed a burden on the ability of police to conduct effective investigations, it was deemed justified by the importance of preventing coerced confessions which cut so sharply against the grain of

fundamental fairness that is so central to our constitutional fabric. Despite this burden, the "bright-line" rule of ***Miranda*** has been lauded for its ease of application both on the streets and in the courts. *E.g.*, ***New York v. Quarles***, 467 U.S. 649, 661-64 (1984) (O'Connor, J., concurring and dissenting in part).

The rule Respondents propose, requiring a law enforcement officer to obtain specific authorization to search the object or area of suspicion has this same virtue. The rule would provide a quick and simple answer for law enforcement officers involved in quickly developing investigations who are otherwise faced with innumerable difficult issues and dilemmas that must be instantly resolved to effectively carry out the investigation. Requiring the officer to specifically request permission to search the object or area suspected of containing contraband would remove all guess work on the part of the officer regarding what may and what may

not be searched. It would also substantially diminish the number of searches that are erroneously conduct beyond the scope of the consenter's free and voluntary will which is the polestar of these types of searches. The rule would likewise reduce the administrative burden on our state and federal courts which spend hours upon hours meticulously culling through volumes of testimony and evidence attempting to determine the subjective intent of defendants which the searching police officers failed to elicit prior to the searches. For all of these reasons, a bright-line rule requiring police officers to elicit consent to search the specific areas or objects of their suspicions should be adopted by this Court.

D. ANY DISTINCTION IN THE PERMISSIBLE SCOPE OF A CONSENT SEARCH BASED ON THE NATURE OF THE CONTAINER ENCOUNTERED WILL DENY EQUAL PROTECTION AND RESULT IN IMPERMISSIBLE DISCRIMINATORY APPLICATION OF THE FOURTH AMENDMENT.

It is unquestionable that the fourth amendment's prohibition against unreasonable searches of persons, houses, papers, and effects guards against unreasonable governmental intrusion into any receptacle that might contain personal effects. *E.g.*, ***United States v. Chadwick*** , 433 U.S.1, 7-9 (1977). It is further clear that all containers whose contents are not apparent from their outward appearance are protected equally by the fourth amendment. ***Robbins v. California***, 453 U.S. 420, 425-27 (1981). As this court explained in ***Ross***, the central purpose of the fourth amendment forecloses any distinctions:

> For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveller who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim and equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Id. at 822.

The rule proposed by the United States, that general consents to search automobiles include the authority to open any closed container, such as a paper bag, that can be opened without causing significant property damage, and excluding closed containers like locked briefcases that cannot, draws an impermissible distinction between the protection afforded to a pauper and an aristocrat. Such a rule would force the pauper to forfeit his expectation of privacy in the only container he can afford to protect his most valuable belongings when

he is deceived to utter words intended only to authorize a limited search but which, by law, is deemed to authorize a greater search. On the other hand, this rule would protect the incriminating evidence of the rich man who uttered the exact same words, even where these words were, in fact, intended by him to extend to a secure receptacle such as a locked briefcase.

It cannot be denied that the container of choice of members of the lower economic strata is a paper or opaque plastic bag. They use them to collect and carry their toiletries, private papers, and other items they seek to keep private from the world around them. Unfortunately, these containers are also sometimes used to carry drugs. Our constitution, which guarantees due process and equal protection under the law to all, would not countenance the invidious distinction between rich and poor that is central to the rule proposed by the United States'. For this reason, it must be firmly

rejected.

While it may be argued that requiring police officers to elicit specific and unequivocal consent to search areas they would not normally be entitled to search might, in some cases, result in the police failing to discover evidence of a crime, it must be recognized, as this Court has recently noted: ". . . there is nothing new in the realization that the constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." ***Arizona v. Hicks*** 480 U.S. 331, 339 (1987).

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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